

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

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: :
SONY MUSIC ENTERTAINMENT, et al., :
Plaintiffs, :
: :
-vs- : Case No. 1:18-cv-950
: :
COX COMMUNICATIONS, INC., et al., :
Defendants. :
: :
-----:

VOLUME 6 (A.M. Portion)

TRIAL TRANSCRIPT

December 9, 2019

Before: Liam O'Grady, USDC Judge

And a Jury

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1 NOTE: The December 9, 2019, portion of the case
2 begins in the absence of the jury as follows:

3 JURY OUT

4 THE COURT: All right. Good morning. I see all
5 counsel are here. I hope you all had a good weekend and -- Mr.
6 Buchanan.

7 MR. BUCHANAN: Good morning, Your Honor.

8 THE COURT: Good morning.

9 MR. BUCHANAN: I have just a quick matter regarding a
09:03:39 10 witness, Paul Jarchow, who is a Cox employee. And he is going
11 to be -- the plaintiffs want to bring him in as a witness or
12 force us to bring him as a witness from the West Coast. He is
13 an ICOMS billing data individual.

14 The data in question or the exhibits in question
15 relate to the names of the business subscribers that are
16 involved in this case.

17 So early on in this case we, Cox, produced the
18 billing data for both residential subscribers and business
19 subscribers. Then there was an issue about the names of the
09:04:17 20 business subscribers, the plaintiffs wanted those.

21 So we worked out a process similar to what happened
22 in BMG where we sent out notices to the business subscribers
23 alerting them that their names may be utilized in court or
24 disclosed. And certain business subscribers responded. Almost
25 all didn't. So, therefore, they waived their objection.

1 And so, the plaintiffs have identified in this data
2 that is in this exhibit, as have the defendants, including the
3 names of the business subscribers, and there's no objection on
4 either side.

5 So we don't feel that Mr. Jarchow, who collected the
6 ICOMS data for the business subscribers and the residential
7 subscribers, is a /necessary witness.

8 The plaintiffs want us to call him because they want
9 him, who is an administrator, again in Cox, ICOMS billing data,
09:05:10 10 to come in so they can cross-examine him or examine him on what
11 are the nature of the networks and the operations of the
12 networks of the business subscribers. He can't testify to
13 that. He has no knowledge whatsoever about that.

14 And by the timing that we produced this data, the
15 plaintiffs could have gone and picked selective business
16 subscribers and tried to depose them who fit within the
17 discovery regime.

18 So we do not believe that it's necessary to bring Mr.
19 Jarchow just to put him on the stand to say, I'm an
09:05:43 20 administrator, I don't know what some hospital or student
21 housing operations -- I don't know their system. I'm not a
22 network guy to begin with, and I would never know what they do,
23 that's not my job.

24 So we were just trying to avoid bringing him all the
25 way from the West Coast when either party is objecting to the

1 documents themselves.

2 THE COURT: All right. And have you tried to get an
3 affidavit or some kind of stipulation about what he would say
4 if he was called to testify?

5 MR. BUCHANAN: We can do that, Your Honor. I don't
6 think there is any dispute as to his job and his knowledge, but
7 we could do that.

8 THE COURT: All right. Thank you.

9 Mr. Oppenheim.

09:06:17 10 MR. OPPENHEIM: Good morning, Your Honor. Let me
11 begin by assuring the Court over the weekend we have made an
12 effort to try to hone our case so we can move this along.

13 THE COURT: All right.

14 MR. OPPENHEIM: With respect to this particular
15 issue, in the heat of the end of discovery when we were
16 triple-teaming depositions around the world, literally around
17 the world, this data list of business customers was produced.

18 It's, obviously, not the entirety of what's in Cox's
19 records regarding these subscribers. It doesn't indicate
09:06:50 20 things that have come up in this trial. Whether or not a
21 hospital, when they are listed as a customer, it's their public
22 WiFi or its their critical infrastructure.

23 The only experience we actually have is the one that
24 filed something in court, I believe it was, or at least sent a
25 letter raising questions about the disclosure of their

1 information. It was a hospital. And that disclosure said it
2 was a public WiFi system. But none of -- this data spreadsheet
3 doesn't say that.

4 So what they want to do is require the plaintiffs to
5 stipulate to this list of customers, which is an incomplete
6 dataset on those customers. So we're not willing to do that.

7 If Mr. Jarchow can sponsor it, then, fine, we can ask
8 him questions. He may not know the answers. We don't know, we
9 didn't get a chance to depose him. We certainly didn't have
09:07:47 10 time to depose all of the business customers. Nor do I think
11 would Cox have allowed us to do that, go and start deposing
12 their business customers.

13 But anyway, if they want to offer some stipulation,
14 we are happy to consider it. I don't think we should be
15 required to stipulate to an exhibit which we think is
16 incomplete.

17 THE COURT: Well, you know, the day -- I have denied
18 Mr. Buchanan the right to look at -- to go through -- go back
19 through discovery issues with the production on the testimony
09:08:24 20 of MarkMonitor, and I'm not going to give you the opportunity
21 to do the same thing. I mean, discovery is over. You got what
22 you got. I am not going back into the timing of anything.
23 That's Judge Anderson's job.

24 MR. OPPENHEIM: Of course.

25 THE COURT: And so, you know, try and work out a

1 stipulation. But if you are blindly calling somebody from
2 California not knowing what they're going to say, I'm not going
3 to permit that.

4 MR. OPPENHEIM: Your Honor, we're not calling him.

5 THE COURT: Oh.

6 MR. OPPENHEIM: So would -- let me -- I'm not sure it
7 was presented quite the way I would have presented it.

8 The defendants want to force the plaintiffs to
9 stipulate to the admissibility of an exhibit for which they
09:09:06 10 have not laid a foundation and we believe is incomplete.

11 In order for them to lay a foundation for that
12 exhibit, they need Mr. Jarchow to come -- and I apologize if I
13 mispronounced his name -- to come from California. And they
14 don't want to bring him from California.

15 We believe that if they want to put this exhibit in,
16 they need to bring him so we can ask him: Mr. Jarchow, this
17 doesn't have information about whether it's critical
18 infrastructure or public WiFi. This doesn't have information
19 in it about this or that.

09:09:37 20 To ask questions about -- they may get the document
21 in with him, but it gives us an opportunity to cross-examine
22 him about the document. They want to forego that so they get
23 to force us to put a document in that they can then use to talk
24 about critical infrastructure which, in fact, may not be the
25 case.

1 THE COURT: Okay. Now I better understand. Thank
2 you.

3 MR. BUCHANAN: Just to be clear. They did depose
4 Mr. Jarchow, and they did depose him after they had the billing
5 data.

6 So the issue -- yes, it goes to a stipulation, but
7 not to the documents themselves. So they identified these
8 business records and the names of the subscribers that have the
9 business names. They have identified those, as have we, and
09:10:27 10 neither side has objected to the admission of those documents.

11 What they want Mr. Jarchow to come in -- and what
12 they won't stipulate to -- I guess I wasn't clear there. They
13 want him to come out just so they can ask him, a billing
14 administrator: Do you know how the networks of these
15 subscribers operates?

16 And I can give the Court an affidavit. He will say:
17 I don't know. I work in billing because I am an administrator.
18 I have no idea whether they have public WiFi or not. I just
19 gathered in response to a court order. I went into the system
09:11:01 20 and pulled the data and the names.

21 THE COURT: Okay. Understood.

22 MR. BUCHANAN: So there is no objection to the
23 documents themselves. They just want to have somebody say, I
24 don't know --

25 THE COURT: You produced the documents. They deposed

1 somebody after they had the documents on what the documents
2 included or didn't include?

3 MR. BUCHANAN: So they didn't ask him those
4 questions. But, as I understand it, they deposed Mr. Jarchow
5 and they had this data. And they don't object to the data,
6 it's just the underlying billing information. They just want
7 to ask Mr. Jarchow --

8 So they -- just to be clear, they did depose him,
9 they had the billing data, but they didn't have the names at
09:11:47 10 that time. So that came in afterward. But they still had time
11 to depose, to go back to him if they wanted on that particular
12 issue or another witness they could have designated or asked us
13 to produce.

14 So now to bring him out -- and he just doesn't have
15 that information. The point is, it's a courtesy thing. If I'm
16 representing to the Court that you could -- the Court could
17 say, well, that is a relevant question, but this individual, he
18 is an administrator, he has no idea. They should have asked
19 somebody else during discovery about that issue and determined
09:12:18 20 this whole WiFi issue and which ones have it.

21 But, you know, this witness is not going to be
22 helpful on that issue.

23 THE COURT: Okay. Thank you.

24 Mr. Oppenheim or Mr. Gould.

25 MR. OPPENHEIM: To be clear, we did take

1 Mr. Jarchow's deposition. They avoided producing this
2 information until after we had taken his deposition. We didn't
3 go back. We --

4 THE COURT: Okay.

5 MR. OPPENHEIM: As the Court is aware, discovery was
6 very busy. But that doesn't mean we waived our right to
7 examine a witness on a document. So --

8 THE COURT: Well, if he has no information to provide
9 beyond what's in the document because he's an administrator and
09:12:54 10 he's going to issue an affidavit or declaration which says
11 that, then I'm not going to have him come from the West Coast.

12 MR. OPPENHEIM: Your Honor, we're happy to offer some
13 stipulative language on -- they didn't -- that while they
14 produced this document, it doesn't indicate whether it's
15 critical infrastructure or public WiFi, and offer that, and
16 negotiate a stipulation.

17 But I think what they're attempting to do is to get
18 this information in and not have anybody testify about it, and
19 then in closing make their critical infrastructure argument and
09:13:32 20 we'll have nobody that we can speak to about this.

21 THE COURT: Okay.

22 MR. OPPENHEIM: And that denies us the right to
23 present to the jury that that information is missing.

24 THE COURT: Well, I can't force you to agree to admit
25 a document you think is incomplete and has no proper basis.

1 And so, you all continue to work on that. I mean, I
2 am not going to release a witness that Cox may be required to
3 call. But on the other hand, if you look at these records and
4 all that you've got is what you got and you didn't depose
5 somebody about what else -- what is included and what is not
6 included in that document, then that's a matter that was --
7 that's a discovery-related document, you're not going to get
8 there, and you've got to live with it.

9 And, frankly, it's such a collateral issue, I know
09:14:37 10 you're tying up every bow that you can, but, you know, you
11 think the jury hasn't picked up on the fact that you've got
12 business clients who -- Cox has business clients who are big
13 clients who are fraternities or hospitals, and you've already
14 gone over the fact that they are, they do or they don't have
15 public WiFi, with multiple witnesses, at least significantly
16 with one of them, then you're not listening to the testimony
17 yourself.

18 I mean, this jury has heard it and they will make
19 credibility determinations on those issues. And clearly
09:15:17 20 they've heard both sides of it.

21 But I am not going to bring a witness here from
22 California so that -- if he's -- if there is an affidavit or
23 declaration that says, I don't know what's in this, and I don't
24 know what these third-party customers, subscribers have on
25 their systems; then that's something you need to work out.

1 MR. OPPENHEIM: May I -- it's more about what Cox
2 knows about these customers that's not in that spreadsheet.

3 May I offer a suggestion for resolution that maybe
4 resolves it?

5 THE COURT: Yeah.

6 MR. OPPENHEIM: Maybe on Wednesday after court, since
7 he's on the West Coast, we could do a short telephonic
8 deposition on these issues, and then we can designate that in
9 rebuttal if need be.

09:16:11 10 THE COURT: That sounds like a good suggestion.
11 Let's work on that.

12 MR. OPPENHEIM: Okay.

13 MR. BUCHANAN: Thank you, Your Honor.

14 THE COURT: All right.

15 MR. OPPENHEIM: So in light of the court -- turning
16 to the next issue, unless there was something else on that.

17 THE COURT: No.

18 MR. OPPENHEIM: In light of the Court's direction on
19 Friday evening --

09:16:30 20 THE COURT: Yeah --

21 MR. OPPENHEIM: -- we indicated to defendants on
22 Friday evening that we're going to rest with respect to
23 Mr. Vredenburg and pass the witness.

24 So we'll allow that to occur and just move forward.

25 THE COURT: Okay. So he's here. You didn't send him

1 back to Virginia Beach with no questions by you, Mr. Buchanan?

2 MR. BUCHANAN: No, Your Honor.

3 THE COURT: You're not going to take the stand in his
4 stead? That would be entertaining.

5 All right. Then are we ready for our jury?

6 MR. BUCHANAN: Yes, Your Honor.

7 THE COURT: Okay. Joe, let's get the jury, please.

8 NOTE: At this point the jury returns to the
9 courtroom; whereupon the case continues as follows:

09:17:42 10 JURY IN

11 THE COURT: All right. Good morning, ladies and
12 gentlemen. Please have a seat.

13 Thank you again for making your way back in here. We
14 had a few matters to discuss before we got you out here this
15 morning. I apologize for the delay.

16 Let me have a nod of heads that you didn't do any
17 research or investigation or talk to anybody about the case.
18 All right. Thank you very much.

19 I hope you all had a good weekend, and we are going
09:18:06 20 to begin -- the plaintiffs have ended their direct examination
21 of Mr. Vredenburg, and we're going to begin cross-examination
22 at this time.

23 Mr. Buchanan.

24 Oh, we need -- good morning, Mr. Vredenburg. Please
25 come forward, sir.

1 Good morning.

2 THE WITNESS: Good morning, sir.

3 ROGER L. VREDENBURG, previously called by counsel for
4 the plaintiffs, having been duly sworn, continues to testify
5 and state as follows:

6 CROSS-EXAMINATION

7 BY MR. BUCHANAN:

8 Q. Good morning, Mr. Vredenburg.

9 A. Good morning.

09:18:59 10 Q. How are you this morning?

11 A. Oh, good.

12 Q. Did you have a good weekend?

13 A. Yeah, maybe. It worked out good.

14 Q. Are you here with your wife?

15 A. Yes, sir.

16 Q. Okay. And where are you from?

17 A. I'm from Virginia Beach.

18 Q. Now, there has been some testimony about your term of
19 years or your employment at Cox.

09:19:20 20 Where did you work before you started at Cox?

21 A. Before I started at Cox, I worked for Verizon.

22 Q. Okay. And what about before that?

23 A. Before that, I was in the military, United States Navy.

24 Q. And how long?

25 A. 26 years.

1 Q. Was your wife also in the Navy?

2 A. She did five years in the Navy, yes.

3 Q. Okay. And just briefly, what did you do in the Navy?

4 A. I was assigned to several destroyers, working on weapons
5 systems.

6 Q. Okay. Thank you. Now, I'd like you to -- if you could
7 pull up the Plaintiff's Exhibit 10. I believe that was put
8 into evidence. It's the ticket data.

9 So there's a number of items on this sheet that
09:20:09 10 Mr. Gould asked you about. First of all, there is several -- I
11 think there's 20 that say -- refer to bandwidth limitation.

12 A. Yes.

13 Q. Okay. Does that have anything to do with a DMC notice?
14 DMC --

15 A. No, did not, separate issue.

16 Q. And then there's some that talk about or reference hard
17 limit for complaint. Do you see those? I think there's 13 of
18 those.

19 A. Okay. I see one of them.

09:20:40 20 Q. And I think this goes over a three-year period; is that
21 right?

22 MR. GOULD: Your Honor, I'd just ask to please watch
23 the leading questions.

24 MR. BUCHANAN: Well, this is cross, so --

25 THE COURT: Yes. But I'll allow the introductory

1 questions to be presented in this way.

2 BY MR. BUCHANAN: (Continuing)

3 Q. Okay. So on a hard limit, is that -- what does that mean?

4 A. A hard limit is when the complainants were sending tickets
5 and they reached their amount for the day that they were able
6 to send. So we would send a notice back that they reached
7 their limit.

8 Q. Okay. And does that give the opportunity for the
9 complainant or the content owner then to reintroduce the notice
09:21:24 10 the next day?

11 A. Sure, yes.

12 MR. GOULD: Objection, Your Honor, leading.

13 THE COURT: I'm going to allow it.

14 BY MR. BUCHANAN: (Continuing)

15 Q. Okay. And then there's a number of "sent warning"
16 references in this document. And do those relate to a
17 copyright notice?

18 A. Yes, sir.

19 Q. Okay. Can you tell whether it's the same recording or
09:21:45 20 musical composition?

21 A. Not without looking at the ticket, no.

22 Q. Okay. So could you go to the next page, flip over to
23 page 2 of the document.

24 Do you see where it identifies the infringing file?

25 A. Yes.

1 Q. What does it say?

2 A. It's -- source is peer-to-peer. Title is "Just Dance."
3 And then it gives the file name, "Just Dance, Disney Party."
4 It's the file size and the type of file.

5 Q. That's a kid game, is it not?

6 A. I -- "Just Dance, Disney Party," I would assume it's
7 something for young people, yes.

8 Q. Okay. So you were also asked about whether there was a
9 three-strikes-and-you're-out policy?

10 A. Yes.

11 Q. Okay. Was there such a policy?

12 A. No, there was no policy, three-strike policy.

13 Q. Okay. And could you explain.

14 A. What the three-strike policy started out as, the phone
15 calls, of course, came into Tier 2 techs, the first -- that's
16 the first time a customer would talk to them about a DMCA
17 issue. And for some reason, the techs -- we don't know why,
18 started telling customers that we have a three-strike policy.

19 The only thing we could think of, they were referring
09:23:02 20 to the graduated response. And the three-strike, then kept
21 perpetuating because you get new techs on and they say, oh,
22 that's what we were supposed to tell them and then put it in
23 the notes. But --

24 THE COURT: All right. Well, I'm having a little
25 trouble hearing you. So slow down just a little bit.

1 THE WITNESS: Okay.

2 THE COURT: And speak into the mic, the microphone in
3 front of you.

4 THE WITNESS: All right. I'm sorry. What it was --
5 like I said, there was a -- the three-strike policy was
6 something that the techs were telling the customers. But it
7 wasn't anything official. There was nothing written about the
8 three-strike policy. It was just something that the techs were
9 using on the customers to give some sort of a scare tactic, I
09:23:35 10 would assume. I don't know.

11 But then, later on, management abuse in Atlanta and
12 tech management came out and said, do not tell anybody there's
13 a three-strike policy, there's no such thing. And then that's
14 when it basically ended or stopped being used.

15 BY MR. BUCHANAN: (Continuing)

16 Q. So did you -- and when you spoke to subscribers that got
17 notices on the phone, did you use any sort of information or
18 techniques to try to discourage them from continuing to
19 download music, assuming they had done that?

09:24:07 20 A. The techniques I would use would be just to let them know
21 that there are things out there that are happening in the
22 world. You know, there are people being sued for thousands --
23 hundreds of thousands of dollars for, you know, sharing.
24 There's people that are being sued for different uses of their
25 system when it might not even be them using it.

1 Sorry. I can't get this right.

2 And I would tell them, you know, just do this, do
3 that, and, you know, things can happen if you pursue it, if it
4 keeps going on. It was just more of an information thing to
5 let them know.

6 Q. So if I heard you right, you said you would reference
7 litigation that had been brought against subscribers to these
8 individual subscribers to discourage them from infringement?

9 MR. GOULD: Objection, Your Honor. Mr. Buchanan is
09:24:58 10 testifying.

11 THE COURT: Overruled. I think that's what he said.

12 But is what you just said a moment ago that was a
13 little hard to hear -- understand?

14 THE WITNESS: Yeah, about referring to earlier
15 litigation? Yes, we would tell the customers. Sometimes I'd
16 even refer them, if it was current, to a Web site or a link and
17 say, hey, here's -- you could read about it all on your own.

18 Or I would tell them, just look in -- you know, go
19 ahead and do a Google search and look up litigation on stuff.
20 And then --

21 BY MR. BUCHANAN: (Continuing)

22 Q. So I would like to move to the issue of the reduction in
23 force from 9 to 4. Do you recall that Mr. Gould asked you
24 about that?

25 A. Yes.

1 Q. Did that affect your ability to handle DMCA notices?

2 A. No, it did not.

3 Q. Okay. Could you look at Plaintiff's Exhibit 197 in the
4 plaintiffs' trial exhibits. You should have a binder there.

5 A. Is there a tab number or --

6 Q. Yeah, it's Tab 4. It says: State of Customer Safety,
7 2011.

8 Do you see that document? You should -- it should be
9 the plaintiffs' exhibit binder. Are you looking at --

10 A. Oh, I --

11 Q. Okay. You may have to --

12 THE COURT: Joe, can you --

13 A. Binder --

14 THE COURT: What exhibit is it?

15 MR. BUCHANAN: It's PX 197. It's Tab 3 in my binder.
16 There's -- is there two binders up there?

17 COURT SECURITY OFFICER: Yep, right here. He has got
18 it, counsel.

19 MR. BUCHANAN: Okay. Sorry. Okay.

09:26:44 20 THE WITNESS: I see it.

21 MR. BUCHANAN: I'd move this into admission at this
22 time. It's the plaintiffs' exhibit.

23 MR. OPPENHEIM: Your Honor, I tried to move this in
24 with Mr. Vredenburg. He said he had never seen it and the
25 defendants objected. We would maintain the objection as well.

1 MR. BUCHANAN: I wasn't sure that that was about this
2 document, but --

3 THE COURT: Well, I think it was.

4 MR. BUCHANAN: Okay.

5 THE COURT: But see if he can -- do you want him to
6 look -- reference any of it? He may do that.

7 MR. BUCHANAN: That's what --

8 BY MR. BUCHANAN: (Continuing)

9 Q. If you could look at page 2 where it says: Stats.

09:27:16 10 A. Okay.

11 Q. All right. And where it says: We expected the time to
12 resolution would increase.

13 Do you see that? Could you just read that particular
14 section, like three sentences.

15 THE COURT: We don't have a -- the document isn't
16 admitted. If -- read to himself and you've got a question for
17 him, that's fine.

18 MR. BUCHANAN: Okay. That's what I was trying to
19 refer him to.

09:27:37 20 THE COURT: Right. Don't -- you asked him to read it
21 out loud.

22 MR. BUCHANAN: Oh, I'm sorry.

23 BY MR. BUCHANAN: (Continuing)

24 Q. If you could just read that to yourself.

25 A. All right.

1 Q. So does that -- is that consistent with your recollection
2 as to whether the reduction in force affected the handling by
3 the Technical Review Centers of the copyright notices?

4 A. It didn't -- to me, it's showing it didn't affect it at
5 all.

6 Q. Okay. Is that -- but is that what this is saying here?

7 A. That's what it's saying to me, yes, sir.

8 Q. Okay.

9 MR. GOULD: Your Honor, I move to strike.

09:28:22 10 Mr. Buchanan is testifying --

11 THE COURT: Yeah, it's --

12 MR. GOULD: -- about the document.

13 THE COURT: Overruled.

14 BY MR. BUCHANAN: (Continuing)

15 Q. So could you turn to tab 4 in my binder.

16 Now, before you answer any questions about this,
17 Mr. Vredenburg, I wanted to go over a few steps.

18 Now, I think you've testified that notices would come
19 in to Cox from copyright owners and they would be forwarded to
09:29:11 20 customers; is that right?

21 A. Correct.

22 Q. And along with the notice would be an e-mail from Cox that
23 would accompany that notice?

24 A. Correct.

25 Q. And did there come a time where subscribers would e-mail

1 back to Cox in response to those notices?

2 A. Yes, they would.

3 Q. Okay. And how often did that occur?

4 A. Oh, it was a few times, several times a week.

5 Q. Pardon me?

6 A. Several times a week.

7 Q. Several times a week?

8 A. Yeah. We'd also get phone calls from them.

09:29:48 9 Q. Okay. And what would happen to those notices in
10 response -- or, sorry, those e-mails from subscribers in
11 response to the notices of infringement?

12 A. You mean the ones they sent back to us?

13 Q. Yeah. Would they be -- come into the CATS system?

14 A. Yeah, they come into the CATS system so we could review
15 them.

16 Q. Would you have access to them?

17 A. Yes.

18 Q. On your computer?

19 A. Yes.

09:30:05 20 Q. And what would you do with them when they came in?

21 A. We pull the ticket up and read it and respond to the
22 customer, whatever they were asking.

23 Q. Okay. And would you respond by e-mail or phone?

24 A. It would depend on what was going on with the system. If
25 it was going to be more difficult, we would call them up

1 from -- to give them better help.

2 Q. And could you look at this particular e-mail.

3 MR. OPPENHEIM: May we approach, Your Honor?

4 THE COURT: Yes, sir.

5 NOTE: A sidebar discussion is had between the Court
6 and counsel out of the hearing of the jury as follows:

7 AT SIDEBAR

8 THE COURT: Yes, sir.

9 MR. GOULD: The defendants, I believe, are about to
09:30:52 10 try and enter through Mr. Vredenburg a number of e-mails in
11 which customers responded, apparently to warnings that Cox
12 sent. It's outside the scope of my cross. Cox did not list
13 Mr. Vredenburg as a witness they intended to present. Their
14 scope of their examine should be limited to the scope of my
15 examine.

16 MR. BUCHANAN: So I believe it is within the scope
17 because he talked about the process of handling notices, how
18 they handled them, the ticket data. He went through that one
19 ticket data that listed all that had a notice attached, it
09:31:25 20 references who to call, that's all in evidence. That's one
21 thing.

22 Plus, we did not list him as a will call on ours, but
23 we captured all of their witnesses on ours. We said anyone you
24 are going to call, then we're going to call.

25 MR. GOULD: Respectfully, that last piece is a little

1 thin, but I understand the argument.

2 There is no testimony on my initial examine about any
3 direct interactions with customers. That's beyond the scope.

4 THE COURT: Yes. We're not going to call him back
5 from Virginia Beach in Cox's case in chief to go through this,
6 and I am going to allow them to expand the cross-examination to
7 include customers. And your exception is noted.

8 MR. GOULD: Thank you, Your Honor.

9 THE COURT: Hold on one second. I don't know what
09:32:08 10 document this is because you are identifying tabs versus
11 exhibits. So I don't know what this one looks like.

12 What is it, just one customer?

13 MR. BUCHANAN: Yes. And I will identify it right
14 now.

15 THE COURT: Okay. And what is your -- how broadly
16 are you going to question Mr. Vredenburg about customer
17 responses?

18 MR. BUCHANAN: I am going to show him four responses
19 and ask if these are typical. And then I'm going to ask him
09:32:34 20 about, say, did you look at a large -- like 50 others that I
21 gave him, and to see if those were similar.

22 And then the idea is to lay the foundation for the
23 1,700 that you've said could come under present sense
24 impression. But I want to also expand that to business records
25 because these are part of their business records and were

1 retained in the CATS system. I'm not going to spend very much
2 time on it, just a couple minutes.

3 THE COURT: Okay. I am going to allow the four of
4 his examples.

5 Where do the 50 come from?

6 MR. BUCHANAN: So I have a folder where I had him go
7 through 50 others.

8 THE COURT: Are they --

9 MR. BUCHANAN: They are all part of the 1,700. They
09:33:12 10 all have an exhibit. But I will just reference -- the point
11 is, I wanted to lay a foundation. If the Court is saying his
12 testimony right now in going over those four is enough to lay
13 the foundation --

14 THE COURT: Well, he doesn't know any of the
15 specifics about any of these other customers. And what I said
16 was, these numbers could come in for purposes of showing that
17 Cox employees knew the customers were being involved. I think
18 having him identify the 50 and the specifics of what their
19 complaints were or -- I think is over the line.

09:33:45 20 MR. BUCHANAN: So the only purpose I had him do the
21 50 is so that there's -- he could say, I looked at a lot of the
22 1,700, and these are the type of e-mails we got.

23 He is not going to tell us anything about the
24 specifics of the 50. That was just going to go to the
25 foundation for the Court if it wanted. And then Brent Beck

1 will testify how he pulled all 1,400 out of there, the ICOMS
2 database.

3 THE COURT: Show him the four, ask him whether these
4 are representative of the type he got, and then we will get to
5 Brent Beck down the line with the rest.

6 Yes, sir.

7 MR. OPPENHEIM: Your Honor, will the jury be given a
8 limiting instruction on what the purpose of the e-mails can be
9 considered for?

09:34:21 10 THE COURT: Yeah, I will probably do that through
11 Beck. But, yes.

12 MR. BUCHANAN: Your Honor, not to belabor this, but
13 if they are business records, we can use them for more than
14 just present sense impression, correct?

15 THE COURT: Well, I don't know that they're business
16 records. You haven't established -- I allowed you to put them
17 in because they were responses that Cox was aware of. If you
18 have a witness who can say, I'm aware of these complaints
19 coming back from our own customers, and so that -- to establish
09:35:04 20 that you knew that customers were pushing back and saying, I
21 didn't do anything wrong, that -- I don't know whether -- you
22 know, I allowed those without even -- without coming in for
23 the -- business records come in for the truth of them.

24 MR. BUCHANAN: That's correct.

25 THE COURT: And i did not allow business records to

1 come in for the truth of them.

2 So if you can establish that down the road --

3 MR. BUCHANAN: Well, Your Honor, he just testified
4 that as part of the process -- so the notices come in as
5 business records, right? Our e-mails attached come in as
6 business records. Their database picks 39 without a single
7 witness testifying they listened to it, came in as they have
8 testified to it.

9 He just testified that part of the process was the
09:35:45 10 e-mails came back into the CATS system. They accessed them on
11 their computer, and they had an obligation to respond to those,
12 and they did, by phone or e-mail. They were captured in the
13 system and kept in the normal course of business.

14 THE COURT: But he's -- I'm not sure he's the witness
15 that can do that --

16 MR. BUCHANAN: Okay.

17 THE COURT: -- to establish that they are business
18 records. But I will consider that down the road.

19 Yes, sir.

09:36:06 20 MR. OPPENHEIM: But even if they are business
21 records, the statements by the customers are not under oath,
22 they are still hearsay, obviously.

23 THE COURT: Yeah. And that's where I drew the line
24 last time. But, okay.

25 MR. GOULD: The last thing, Your Honor.

1 THE COURT: Thank you for refreshing my recollection
2 about that.

3 MR. GOULD: The last thing. I'm little concerned if
4 we wait until Mr. Beck's testimony for a limiting instruction,
5 that this jury will be left with the misrepresentation that
6 they may consider for the truth of the matter an e-mail from a
7 senior citizen saying, I didn't do it, I don't know --

8 THE COURT: Let's see what he testifies to. I agree
9 with you, Mr. Gould. Thank you.

09:36:41 10 NOTE: The sidebar discussion is concluded; whereupon
11 the case continues before the jury as follows:

12 BEFORE THE JURY

13 BY MR. BUCHANAN: (Continuing)

14 Q. Mr. Vredenburg, I think you're looking at tab 4, which is
15 DX 1619. Do you see that?

16 A. Yes.

17 Q. Okay. And could you identify what that is for the Court
18 and the jury, please.

19 A. It looks like a customer response to one of our tickets
09:37:36 20 that were sent out.

21 Q. And the date on that is 3/22/2014, 2014; is that right?

22 A. Yes.

23 Q. Okay. So what is the customer responding to specifically?
24 What is the issue here?

25 A. He was using the system to violate law by sharing

1 copyrighted material.

2 Q. But what is the statement that the particular individual
3 is providing as an explanation for the copyright notice?

4 A. He's saying that he hasn't used that system, and he
5 thought he deleted the program used for sharing awhile back.
6 He says: I'll make sure. Thanks.

7 Q. And if you go down, do you see where it says: Is this in
8 reference to music downloading?

9 Do you see that?

09:38:30 10 A. Yes.

11 Q. And what does he say there, this individual?

12 A. Basically he's saying he only downloads from iTunes, which
13 is of course legal. And I basically said, you can download
14 from iTunes all you want, but you're using a program probably
15 that is sharing it out, and that's the illegal part.

16 Q. All right. Then could you go to DX 496.

17 A. Is that a tab?

18 Q. And this is another e-mail that came from a customer dated
19 February 4, 2013.

09:39:00 20 A. Is there a tab on that? I'm sorry, is there a tab?

21 Q. Yeah, it's the next tab, tab 5.

22 What is the explanation that this individual gives in
23 response to the notice?

24 A. Basically he's saying that this does not come from his
25 system, and he's stating that he knows that people can access

1 probably his system, but he has no idea what to do with it or
2 anything about what's going on.

3 Q. Could you read -- it says: We are senior citizens. Can
4 you read that?

5 A. We are senior citizens, 77 and 74, and wouldn't even begin
6 to know how to do what is set forth below. Please advise.

7 THE COURT: Ladies and gentlemen, Mr. Vredenburg is
8 reading these e-mails that are coming back to Cox to
9 demonstrate that Cox was aware that customers were responding
09:40:08 10 to the e-mails, and some claiming that they had not been guilty
11 of the infringement that they were being charged with.

12 The document -- it's offered for that purpose, and
13 not for the truth of what the customers are saying. All right?
14 Thank you.

15 All right. Please, go ahead, Mr. Buchanan.

16 MR. BUCHANAN: So I would move in DX 1619 and DX 496,
17 Your Honor.

18 THE COURT: Any objection?

19 MR. GOULD: Subject to our prior exception, Your
09:40:35 20 Honor.

21 THE COURT: All right. It will be received.

22 BY MR. BUCHANAN: (Continuing)

23 Q. Could you look at the next tab, please, Mr. Vredenburg,
24 tab 6. It is DX 511.

25 This is an e-mail response from a customer dated

1 2/12/2013. Do you see that?

2 A. Yes, sir.

3 Q. Okay. And could you read the response from this
4 particular customer.

5 A. I have read this e-mail and found the content and deleted
6 both source and material. I am 61 years old and not in the
7 habit of allowing my nephews to use my computer. However -- I
8 am sorry -- and I am not in the habit of allowing my nephews to
9 use my computer. However, not anymore. I do apologize and
09:41:19 10 assure you this will not occur again. Regards.

11 MR. BUCHANAN: Okay. I would move DX 511 into
12 evidence.

13 THE COURT: It will be received, the same exception.

14 BY MR. BUCHANAN: (Continuing)

15 Q. One more, the next tab, DX 544. This is dated
16 February 26, 2013, another e-mail response.

17 DX 544, and it's dated February 26, 2013.

18 A. It states: I have already taken action with Cox to advise
19 me to delete this song, as well as Torrent, from my son's
09:41:55 20 computer, which was done.

21 MR. BUCHANAN: Okay. We would move in DX 544.

22 THE COURT: It will be received, the same exception.

23 BY MR. BUCHANAN: (Continuing)

24 Q. And are these type of responses typical of the e-mails you
25 received from customers and phone calls?

1 A. Yes, they are.

2 Q. Okay. Would you look at the next tab, DX 534 -- this is
3 actually the last one. And this is dated February 22, 2013.

4 A. Okay. I received this e-mail, it talks about unlawful use
5 of posting or transmitting a Michael Jackson song. I talked
6 with my kids that use the computer and they say it was not
7 them. Do have a wireless router, so it is possible that one of
8 my neighbors may be doing this. Or is it possible that this
9 e-mail is a scam and they want me to click on the links below
09:43:16 10 in the e-mail body?

11 MR. BUCHANAN: Okay. Move in DX 534, Your Honor.

12 THE COURT: It is received. The same exception is
13 noted.

14 BY MR. BUCHANAN: (Continuing)

15 Q. So, Mr. Vredenburg, what was your -- what do you see your
16 role at Cox to be as a, you know, review specialist down in
17 Hampton Roads on notices and dealing with customers?

18 A. I always perceived my role as educating the customer and
19 trying to let them make sure they know what's going on with
09:43:55 20 their systems and how to resolve it, stop it from happening.

21 Q. Okay. And did you view your role as to terminate
22 somebody?

23 A. No, I never -- that was not my role. My role was to try
24 to, like I said, educate them. Termination was farthest from
25 my mind.

1 Q. So did you terminate subscribers?

2 A. Yes.

3 Q. About how many during the time you were there?

4 A. A couple dozen.

5 Q. Couple of dozen?

6 A. Yes, sir.

7 Q. And at what point did you decide to terminate them?

8 A. I would decide to terminate them when I just felt like
9 they weren't doing anything anymore. They were just -- like I
09:44:38 10 said, yeah, they were going to cooperate with us, they were
11 working with us, but they -- you could tell they just weren't.

12 And at that point, giving them every chance, every
13 opportunity, and I'd say, well, it's time to terminate them.

14 Q. Was it a difficult thing to do?

15 A. For me to terminate a customer?

16 Q. Yes.

17 A. Yeah. I just didn't like doing it. You know how
18 important the Internet was to a person or to a whole family,
19 you're just -- you're cutting that whole thing off, a whole
09:45:02 20 part of their life. So it's not something you just want to do.

21 MR. BUCHANAN: No further questions.

22 THE COURT: Thank you. All right.

23 Redirect.

24 REDIRECT EXAMINATION

25 BY MR. GOULD:

1 Q. Good morning, Mr. Vredenburg.

2 A. Good morning.

3 Q. How are you today?

4 A. Good. Thank you.

5 Q. Could we pull up DX 1569, please.

6 I may run you a little bit.

7 Oh, I'm sorry, I guess we can't pull it up yet. DX
8 1569.

9 Mr. Vredenburg, you answered some questions about
09:47:15 10 reviewing e-mails that customers sent in in response to e-mails
11 from Cox providing instances of copyright infringement
12 allegations. Do you recall that?

13 A. Yes.

14 Q. And is DX 1569 an e-mail of that kind?

15 A. Yes.

16 Q. And, sir, in this e-mail, what's the date on this e-mail?

17 A. March 4, 2014.

18 Q. And this customer replies to Cox and says the following --

19 MR. BUCHANAN: I'd just object. It's not in evidence
09:47:57 20 yet, Your Honor.

21 THE COURT: Yeah, do you --

22 MR. GOULD: Excuse me. Move to admit DX 1569.

23 THE COURT: Any objection?

24 MR. BUCHANAN: No objection.

25 THE COURT: It's received. Yeah, it's received.

1 BY MR. GOULD: (Continuing)

2 Q. Could we pull up -- and this customer, Mr. Vredenburg,
3 says: Thanks for the e-mail, I will remove it immediately once
4 I get home tonight. It won't happen again.

5 Is that right?

6 A. Yes.

7 Q. And this was March 4, correct?

8 A. Correct.

9 Q. You can pull that down, please.

09:48:28 10 Can we pull up the Elmo, please.

11 Mr. Vredenburg, at the time Cox received this e-mail
12 at DX 1569, it would have had access to this customer's
13 copyright infringement ticket history, correct?

14 A. Yes.

15 Q. And, likewise, would have had access to this customer's
16 copyright infringement ticket history in the period following
17 May 4 -- March 4, 2014?

18 A. Yes.

19 Q. Mr. Vredenburg, what the -- what we've handed you is an
09:49:19 20 excerpt from a larger body of ticket data that was produced in
21 this case for a customer with the ICOMS ID listed on this
22 statement. Do you see that?

23 MR. BUCHANAN: Your Honor, I'm going to object. He
24 just laid a foundation, himself, for a document that --

25 THE COURT: No, I'm permitting that.

1 MR. BUCHANAN: -- where he--

2 THE COURT: No, I'm permitting him to explain where
3 it came from. But we'll see where we go.

4 BY MR. GOULD: (Continuing)

5 Q. Mr. Vredenburg, does this appear to you to be information
6 consistent with a ticket history from a CATS database?

7 A. Appears to be, yes.

8 MR. GOULD: I would move to admit --

9 THE COURT: Well, where does it come from? What's
09:50:00 10 the larger set of documents?

11 MR. GOULD: This is an excerpt from PX 19, which is
12 the ticket data history that Cox produced with something --
13 over 500,000 records.

14 THE COURT: Okay. All right.

15 MR. GOULD: This is an excerpt for ICOMS ID
16 477012799107. And I move to admit.

17 THE COURT: All right. Any objection?

18 MR. GOULD: We can call it PX 550.

19 THE COURT: It'll be received.

09:50:46 20 MR. GOULD: And, Mr. Duval, if we could please pull
21 it up on the screen.

22 BY MR. GOULD: (Continuing)

23 Q. Mr. Vredenburg, if I could direct you to the Ticket ID
24 column.

25 And, Mr. Duval, if you could zoom in on that vertical

1 Ticket ID column?

2 Q. And do you see that if you count the individual number of
3 tickets for this customer, there are seven individual ticket
4 IDs?

5 A. It appears to be seven.

6 Q. And let's -- if you could zoom out, Mr. Duval, and
7 highlight the entry for March 4. There's two line entries for
8 March 4, 2014, horizontally, all the way across.

9 And do you see it -- sorry, could you just highlight
09:51:40 10 it, please.

11 And do you see that in response to this March 4
12 warning, the customer got a warning, correct?

13 A. Correct.

14 Q. And then how many tickets do you see that this customer
15 received after he said: And I will remove it immediately, it
16 won't happen again?

17 A. I wouldn't know. I would never correlate that.

18 Q. Well, let's take a look. After this March 4 entry,
19 there's a ticket for -- there's a ticket on June 5, correct?

09:52:19 20 A. Yes.

21 Q. And on that, in response to that, Cox sent another
22 warning?

23 A. Correct.

24 Q. And then there's another ticket for this customer on
25 October 2014, correct?

1 THE COURT: October 13 or --

2 Q. October 13, 2014?

3 A. Yes.

4 Q. And you see where it says: Sent reply, hard limit for
5 complaints?

6 A. Yes.

7 Q. That in fact means that there's no warning sent to the
8 customer, doesn't it?

9 A. Right.

09:52:53 10 Q. And then if you move down on October 22, 2014, this
11 customer received yet another copyright infringement ticket,
12 correct?

13 A. Correct.

14 Q. And Cox sent another warning, correct?

15 A. Yes.

16 Q. And then in December, customer received another copyright
17 infringement ticket, correct?

18 A. Correct.

19 Q. And Cox sent another warning, correct?

09:53:14 20 A. Correct.

21 Q. And are you aware of what happened with this customer's
22 ticket history after December 2014?

23 A. No, I wasn't.

24 Q. Because it's not shown in the data?

25 A. Correct.

1 Q. You have no way, as you sit here today, whether this
2 customer infringed once more, twice more, 100 times more in
3 2015 and later, do you?

4 A. With this material, no.

5 Q. Mr. Vredenburg, I've handed you another e-mail from a
6 customer responding to an e-mail warning from Cox.

7 Do you see that?

8 A. Yes, sir.

9 MR. GOULD: I would move to admit DX 786.

09:54:19 10 THE COURT: Is this from the same PX 19?

11 MR. GOULD: This is a customer e-mail. I'm going to
12 do a customer e-mail and then an excerpt from PX 19, Your
13 Honor.

14 THE COURT: Oh, all right. Any objection?

15 MR. BUCHANAN: No, Your Honor.

16 THE COURT: It's received.

17 BY MR. GOULD: (Continuing)

18 Q. Now, if we could zoom in and highlight the customer
19 e-mail.

09:54:36 20 This customer responds to an e-mail warning from Cox
21 on June 8, 2013, correct?

22 A. Correct.

23 Q. And if the Court would pardon my language, the customer
24 says: Well, this is bullshit. I haven't downloaded anything
25 illegally using Cox Internet service. I have a Torrent -- I

1 have a uTorrent application on my computer that's been on there
2 for a couple of years. If that's illegal, then kiss my ass.

3 And that's what the customer told Cox in response to
4 the warning, correct?

5 A. Correct.

6 Q. Is this an e-mail that you believed -- is this one of the
7 customer e-mails, sir, that you believed was providing an
8 effective education program to the customer?

9 A. I don't know what we responded to it.

09:55:29 10 Q. And Cox had access to this customer's ticket history at
11 the time it received this e-mail and subsequently, correct?

12 A. It should have, yes.

13 Q. Let's take a look at that customer's infringement history.

14 I'm handing the exhibit, what's marked as PX 551.

15 THE COURT: All right.

16 Q. And this is another excerpt of Cox's ticket data pulled
17 from PX 19 for the customer with the ICOMS ID 436050642911.

18 Do you see that, sir?

19 A. Yes.

09:56:18 20 MR. GOULD: I move to admit PX 551.

21 THE COURT: Any objection?

22 MR. BUCHANAN: No, Your Honor.

23 THE COURT: It's received.

24 BY MR. GOULD: (Continuing)

25 Q. And this is another ticket history extract, similar to the

1 one we just looked at, but this one from the customer who had
2 the friendly e-mail to Cox we looked at a moment ago. And you
3 recall, sir, that e-mail was dated June 8, 2013?

4 A. Correct.

5 Q. And, Mr. Duval, if you could just highlight in yellow, the
6 entry horizontally from June 8, 2013.

7 And then -- actually, if you count the individual
8 ticket IDs presented by this customer's ticket history, would
9 you agree with me that there were 14 infringement tickets in
10 this customer's history?

09:57:10

11 A. I'll agree with you.

12 Q. And then if we look at the infringement history after this
13 friendly e-mail from the customer, we see that just a few days
14 later, on June 14, 2013, this customer receives another
15 copyright infringement ticket, correct?

16 A. Correct.

17 Q. And Cox sent a warning?

18 A. Correct.

19 Q. A couple days later, on June 18, the customer received yet
20 another copyright infringement allegation, correct?

09:57:35

21 A. Correct.

22 Q. Cox sent another warning, correct?

23 A. Correct.

24 Q. And then a couple months later, same thing happens again,
25 correct?

1 A. Correct.

2 Q. So this is a customer that, more or less, told Cox to
3 stick it; is that fair to say?

4 A. That's fair.

5 Q. And this customer continued to infringe?

6 A. Apparently he did, yes.

7 Q. Sir, I've handed you another customer e-mail dated -- I'm
8 sorry, with the Exhibit DX 1602. Do you see that, sir?

9 A. Yes.

09:58:53 10 Q. And this is another -- a similar kind that we've been
11 looking at, correct?

12 A. Correct.

13 MR. GOULD: I'd move to admit DX 1602.

14 THE COURT: Any objection?

15 MR. BUCHANAN: No, Your Honor.

16 THE COURT: It's received.

17 BY MR. GOULD: (Continuing)

18 Q. And if we could pull up the customer's response.

19 On March 14, 2014, the customer says to Cox in
09:59:11 20 response to a notice: We will make sure this is taken off and
21 not used again. Thank you.

22 Correct?

23 A. Correct.

24 Q. And Cox would have had access to this customer's
25 infringement ticket history, both before and after this date?

1 A. Correct.

2 Q. Now, let's take a look at this customer's ticket history.

3 MR. BUCHANAN: What was the exhibit number?

4 MR. GOULD: 552.

5 A. Thank you.

6 BY MR. GOULD: (Continuing)

7 Q. And this will be Exhibit 552, Plaintiff's Exhibit 552,
8 PX 552. A similar extract from Cox's larger ticket history
9 data produced in this case.

10:00:01 10 Do you see that, sir?

11 A. Yes.

12 MR. GOULD: I would move to admit PX 552.

13 THE COURT: Any objection?

14 MR. BUCHANAN: No objection, Your Honor.

15 THE COURT: Received.

16 MR. GOULD: If we could pull that up on the screen,
17 please.

18 BY MR. GOULD: (Continuing)

19 Q. And in this ticket history for the customer who assured
10:00:34 20 Cox that the infringing content would be taken off and not used
21 again, we see that this customer has six tickets in their
22 history, correct?

23 A. Yes.

24 Q. And those are six separate instances of copyright
25 infringement notices that Cox received for this customer,

1 correct?

2 A. Yes.

3 Q. And the e-mail in which the customer promised not to do it
4 again was dated March 17, 2014.

5 Mr. Duval, if we could yellow highlight.

6 So after this customer with ICOMS 436138689605
7 promises not to infringe again, do you see that two days later
8 Cox receives another copyright infringement notice from the
9 same customer?

10:01:21 10 A. Yes.

11 Q. And Cox sent another warning, correct?

12 A. Correct.

13 Q. And then in December of that year, Cox -- there is a
14 ticket entry here -- I am sorry, just one up, Scott.

15 Do you see on this one here Cox received another
16 warning on December 2, 2014, but this time there isn't even a
17 warning listed?

18 A. Yes, apparently there wasn't a warning.

19 Q. So no warning. So this ticket came in, didn't even tell
10:02:03 20 the customer about this one, right?

21 A. Without seeing the actual ticket, I would have no idea
22 what happened to it.

23 Q. But certainly the data provided by Cox demonstrates that
24 there is no warning to the customer, correct?

25 A. Yes, for some reason there wasn't a warning sent, yes.

1 Q. And then on December 8, a couple days later, Cox receives
2 another copyright infringement notice about this customer,
3 correct?

4 A. Right.

5 Q. And Cox sends yet another warning, right?

6 A. Correct.

7 Q. And I think we -- I think you were asked about this. The
8 warnings are the same, each one is the same, right?

9 A. Yeah, the warning is all the same except for the content
10:02:39 10 of what was infringed upon.

11 Q. So they may have infringed more or different or other
12 works, but the language that Cox uses to explain what's going
13 on to the customer is the same?

14 A. Correct.

15 Q. And then we look -- did I do December 11?

16 So December 11 there is yet another copyright
17 infringement ticket for this customer who nine months
18 previously promised, I will never do this again, correct?

19 A. Correct.

10:03:03 20 Q. And then you see that the ticket history for this customer
21 ends in December 2014?

22 A. Correct.

23 Q. Do you have any idea, Mr. Vredenburg, how many times this
24 customer infringed after December 2014?

25 A. No, I do not.

1 Q. Could have been once?

2 A. It could have been.

3 Q. And it could have been 100 times; is that right?

4 A. Yes.

5 THE COURT: Mr. Vredenburg, when it says, changed
6 status to closed, tell us again, what does that mean?

7 THE WITNESS: That means that the action on the
8 ticket has -- a warning has been mailed. And so they are just
9 closing out the ticket.

10:03:48 10 THE COURT: Thank you.

11 MR. GOULD: Thank you, Mr. Vredenburg. I have no
12 further questions at this time.

13 RECROSS-EXAMINATION

14 BY MR. BUCHANAN:

15 Q. Could you pull up that last exhibit, 552. And could
16 you --

17 THE COURT: Ladies and gentlemen, this is another one
18 of the witnesses who is a former employee of Cox, but is
19 testifying at one time instead of coming back in Cox's case in
10:04:19 20 chief, so that we don't inconvenience him unreasonably.

21 Thank you.

22 BY MR. BUCHANAN: (Continuing)

23 Q. So, Mr. Vredenburg, do you see what is highlighted by the
24 plaintiffs?

25 A. Yes.

1 Q. Okay.

2 MR. GOULD: You mean by the defendants' team?

3 MR. BUCHANAN: You highlighted it.

4 BY MR. BUCHANAN: (Continuing)

5 Q. So, anyway, what is highlighted there, you have a "sent
6 warning" on March 19, 2014, right?

7 A. Correct.

8 Q. Okay. And then there is the warning in question where the
9 individual said, I will do my best to stop on March 17, 2014,
10:05:15 10 right?

11 A. Yes.

12 Q. Okay. So that could -- that warning could be for the same
13 particular copyrighted work, right?

14 A. Yes, sure.

15 Q. Because the person that is sending the notice,
16 MarkMonitor, they could be taking some time to detect it and
17 sending it, so there would be a delay, so it could be for the
18 same thing?

19 A. Yes, sir.

10:05:40 20 Q. In fact, the later ones on 12/8 and 12/11, if the
21 individual didn't actually delete the file, you know, he just
22 forgot, or he thought he did it and didn't do it right, that
23 would generate another warning, wouldn't it?

24 A. Correct.

25 Q. Okay. So for all these items that the plaintiffs

1 highlighted for you over different times, there is no
2 indication that that isn't for the same piece of work, correct?

3 A. On this here, no.

4 Q. Okay. And on the others you showed, there was various
5 tickets, but the warnings that were sent out, they could be for
6 one or two different pieces of work even if there is eight
7 notices, they could be for the same or they could be for two
8 different copyrighted works, right?

9 A. Correct.

10:06:31 10 MR. BUCHANAN: Okay. I've no further questions.

11 THE COURT: All right. May Mr. Vredenburg be
12 excused?

13 All right. You are excused with our thanks, sir. I
14 hope you have a safe trip back and that the weather isn't too
15 bad for you.

16 Please don't discuss the testimony you have given
17 here until our trial is over. All right?

18 THE WITNESS: Yes, sir.

19 THE COURT: All right. Have a good day.

10:06:59 20 THE WITNESS: Thank you.

21 NOTE: The witness stood down.

22 THE COURT: All right. Next witness.

23 MR. OPPENHEIM: Plaintiffs call Matt Flott.

24 NOTE: The witness is sworn.

25 THE COURT: Good morning, sir.

1 THE WITNESS: Good morning.

2 THE COURT: Please proceed.

3 MATTHEW J. FLOTT, called by counsel for the
4 plaintiffs, first being duly sworn, testifies and states:

5 DIRECT EXAMINATION

6 BY MS. NOYOLA:

7 Q. Good morning, sir. Please state your full name for the
8 jury.

9 A. Matthew James Flott.

10:08:19 10 Q. Mr. Flott, where do you work?

11 A. I work at Warner Music Group.

12 Q. What is your position at Warner Music Group?

13 A. I am the executive vice-president and chief financial
14 officer for the Recorded Music Division.

15 Q. Is the Recorded Music Division, that houses the record
16 labels of Warner Music?

17 A. Yes.

18 Q. What are your general responsibilities as executive
19 vice-president and chief financial officer?

10:08:44 20 A. I have the responsibility for managing the overall
21 financial performance for the Recorded Music Division. That
22 includes reporting our actual results, forecasting our
23 performance, budgeting. It also includes responsibility over
24 our deal process. It includes as well comparisons to market
25 trends, our competitors, and generally supporting the Warner

1 Music senior team in reporting to the Board of Directors and
2 our external reporting.

3 Q. How long have you held this role at Warner Music?

4 A. A little over four, four total years.

5 Q. What is your educational background?

6 A. I have a bachelor of science in accounting.

7 Q. And how long have you worked in the music industry?

8 A. A little over 25 years.

9 Q. How much of that time has been at Warner Music?

10:09:53 10 A. 16.

11 Q. What other roles have you had at Warner Music?

12 A. I first started in 1983 as a staff accountant. When I
13 returned in 2016, I was the CFO for the independent label
14 group.

15 I then moved to be the CFO for our Warner Music Group
16 distribution. I then moved to be the international CFO for
17 Recorded Music. Came in for the first time to the CFO for --
18 over all recorded music. And then I became the chief financial
19 officer for global financial analysis and operations.

10:10:37 20 Q. And then where did you work before you joined Warner
21 Music?

22 A. I joined -- I worked -- just prior to coming back, I
23 worked for Take-Two Interactive in the video game business for
24 three years. I was at BMG Entertainment for four years. I was
25 at Caroline Records for six years. I spent five years at Sony

1 Video on the movie side of the business. And I did an odd year
2 at Exxon as an analyst on the oil and gas side of the business.
3 Q. All right. Let's turn back to Warner Music Group. Can
4 you tell us a little bit about your company and how it fits in
5 the music industry.

6 A. Sure. Warner Music, within the music business, is
7 considered one of the three global majors. And, you know, we
8 operate like everyone else, trying to find the most talented
9 artists and partnering with them to build their brands and, you
10:11:54 10 know, develop their careers around the globe.

11 Q. I think you said majors. What do you mean by majors?

12 A. Majors are generally, if you look at the size of one's
13 market share, so Universal, Sony, and ourselves, the three of
14 us have market share that would be considered, you know, larger
15 than the other smaller, independent companies.

16 Q. What are some of the record labels in Warner Music Group?

17 A. The three primary labels that we were built off of were
18 Atlantic Records, Warner Brothers Records, now Warner Records,
19 and Elektra Records.

10:12:39 20 We also have a variety of other labels that come
21 underneath each of those labels from Nonesuch, to Roadrunner,
22 to Fueled By Ramen, just to name a few. But there are hundreds
23 of labels that we have around the world.

24 Q. Are any of the plaintiffs in this case Warner Music Group
25 record labels?

1 A. Yes.

2 Q. Did you assist in the preparation of a demonstrative for
3 your testimony today?

4 A. I did.

5 Q. I would like to pass up to the witness a copy of that
6 demonstrative.

7 THE COURT: Any objection to publishing that?

8 MR. BUCHANAN: No objection.

9 THE COURT: All right. Thank you.

10:13:30 10 BY MS. NOYOLA: (Continuing)

11 Q. Mr. Flott, what does this slide show?

12 A. This slide shows six of our labels that are in the suit.

13 Q. May I refer to all six of these entities as the Warner
14 Music plaintiffs?

15 A. Yes.

16 Q. All right. You can take that down, Mr. Duval.

17 Mr. Flott, are you familiar with the Warner Music
18 plaintiff sound recordings at issue in this case?

19 A. I am.

10:14:03 20 Q. I would like to publish PX 1, which has already been
21 received into evidence.

22 MR. BUCHANAN: No objection.

23 MS. NOYOLA: I also have a copy for the witness.

24 BY MS. NOYOLA: (Continuing)

25 Q. Mr. Flott, I would like to direct your attention to

1 page 112, starting at lines 5446 to the very last page.

2 What do these entries show?

3 A. These show the sound recordings that are included as being
4 infringed in this case of the Warner -- our Warner copyrights.

5 Q. And about how many sound recordings of the Warner Music
6 plaintiffs are listed in this exhibit and at issue in this
7 case?

8 A. Approximately 1,300.

9 Q. All right. You can put that to the side.

10:15:14 10 Did you assist in the preparation of a demonstrative
11 medley of some of the works in this case?

12 A. Yes.

13 MS. NOYOLA: Your Honor, with your permission, I'd
14 like to play that medley.

15 NOTE: The audio recording is played.

16 BY MS. NOYOLA: (Continuing)

17 Q. Mr. Flott, I noticed you nodding your head to music there.
18 Are you familiar with the sound recordings that we just played?

19 A. Yeah, I am.

10:17:35 20 Q. And how are you familiar with them?

21 A. Many of them from when I was growing up. You know, one in
22 particular, "Cashmere," was one of the first concerts I ever
23 went to out at the Capital Center. You know, being the
24 youngest of 13 kids, that was, you know, one of the first ones
25 that I could really go to see.

1 So brings back a lot of good memories.

2 Q. And how -- what do these sound recordings represent to
3 Warner Music Group?

4 A. They're some of the most iconic songs in our catalog and,
5 you know, we want to make sure they're protected.

6 Q. Have you listened to any of the infringing music files in
7 this case?

8 A. I have.

9 Q. How many?

10:18:19 10 A. I listened to 100.

11 Q. And how were those 100 selected?

12 A. It was a random statistical sample.

13 Q. And why did you listen to a sample of the infringing music
14 files in this case?

15 A. I wanted to make sure that I familiarized myself with what
16 was being infringed and whether they were in fact our songs.

17 Q. And what did you conclude after listening to those files?

18 A. That they are in fact our songs listed within the exhibit.

19 Q. All right. Let's turn to the revenues generated from
10:18:55 20 Warner Music's -- Warner Music Group's sound recordings.

21 What are the different ways that Warner Music makes
22 money from its sound recordings?

23 A. We will sell our music in various formats to customers.
24 And we will also license music into sound tracks, into
25 commercials, films.

1 We will license them to competitors in some cases to
2 put together compilations and other works.

3 It will also lead to what we call artist services and
4 expanded rights. So those are other ancillary rights that we
5 might have in concert promotion, in merchandise, and some other
6 areas like that.

7 Q. You mentioned formats. What are the different types of
8 formats that Warner Music Group sells with sound recordings?

9 A. Sure. We sell records in a physical format, so that would
10:20:01 10 be either a compact disc or a vinyl record. They may also come
11 in a box set. We sell it in digital formats, downloads, and
12 streaming. We also sell it in mobile formats, ring back tones.

13 Those are the primary formats that we sell music in.

14 Q. What is Warner Music Group's view on paying its artists?

15 A. We see it as fundamental to our business. Our initial
16 relationship is with the artist. We have to build the trust
17 that they know that we're going to help them develop their
18 careers and that they know that they will be -- they will be
19 paid for the sales that we do on their behalf and our behalf.

10:20:56 20 Q. How would you react if someone said that the Warner Music
21 Group record labels are not collection agents for their
22 artists, but that they actually just collect money for
23 themselves?

24 A. I would say they're misinformed and patently wrong.
25 Fundamental to how and why we've been in business for the

1 decades that we've been in business and, you know, our
2 competitors in some cases longer than that, if we didn't have
3 the trust of our artists that they were going to get paid, then
4 we wouldn't be able to continue to sign and develop and attract
5 artists year in and year out.

6 Q. In your role as executive vice-president and chief
7 financial officer, are you familiar with peer-to-peer piracy?

8 A. I am.

9 Q. Has Warner Music Group been impacted by peer-to-peer
10:22:01 10 piracy?

11 A. We have.

12 Q. What has been that impact?

13 A. It has been -- it's been enormous and significant. In a
14 period of time when music consumption has risen year in and
15 year out, as an industry we've seen revenues decline over that
16 period, over a period of time from its peak to where we are
17 today.

18 Q. What were the consequences of this revenue decline to the
19 music industry as a whole?

10:22:46 20 A. Well, first and foremost, you know, artists were not
21 getting paid. Copyright holders weren't getting paid, as well
22 as union members, as well the musicians working on those
23 records.

24 We, as Warner Music Group, had to rationalize our
25 infrastructure or the labels that we had, and we've had to go

1 through at different points in time and either close labels
2 down, merge them together.

3 Probably the clearest example I could give you would
4 be two of our kind of founding labels of Atlantic and Elektra
5 being merged together to rationalize their costs simply because
6 of the revenue decline.

7 You know, Elektra is the home of artists like "The
8 Doors" and "The Eagles" and "Anita Baker" and others like that.
9 So we also had to lay off people just in terms of looking at
10:23:57 10 what our revenue base could afford and what we wanted to return
11 to our owners.

12 Q. I'd like to hand up the witness a copy of an exhibit
13 that's been premarked as PX 486. Thank you.

14 Mr. Flott, have you seen this document before?

15 A. I have.

16 Q. And at a high level, what is this document?

17 A. It reflects the revenues of the U.S. recorded music
18 business over a period of time.

19 Q. Where does this document come from?

10:24:39 20 A. It comes from the RIAA, which is our U.S. industry
21 association.

22 Q. And how is it that you come across this type of document?

23 A. It is regularly published, and it's a document that I look
24 at on a regular basis.

25 With the RIAA, we do a regularly quarterly call where

1 we go through performance. It's also on their Web site as
2 well.

3 MS. NOYOLA: I'd like to move PX 486 into evidence.

4 THE COURT: Any objection?

5 MR. BUCHANAN: No, Your Honor.

6 THE COURT: It's received.

7 BY MS. NOYOLA: (Continuing)

8 Q. Mr. Flott, can you describe what this chart shows.

9 A. This chart is reflecting the U.S. recorded music revenues.

10:25:28 10 If I look at the left most column, that's marked as the year
11 2000 where industry revenues were in excess of \$14 billion.

12 It continues to the right to 2014 where the revenues
13 are just under \$7 billion.

14 Q. And is this chart specific to Warner Music Group?

15 A. No, it's the U.S. recorded music revenues.

16 Q. Tell us what these different colors on this chart show.

17 A. Each color represents a different format. So the largest
18 color that you see on the left side of the page being orange,
19 that's the compact disc.

10:26:15 20 And as you move to the right, you'll see other
21 formats as they came into play. So in 2004, you start to see
22 purple. That is the -- that's a download, and the different
23 shades are the different forms of whether it was a single or an
24 album.

25 And then we start to see in 2005 green start to come

1 in. And that is streaming and the different types of streaming
2 revenues that come through.

3 Q. Are you familiar with the term "music consumption"?

4 A. Yes, I am.

5 Q. What does that term mean?

6 A. Music consumption means the number of hours that a
7 consumer is -- generally commits to listening to music.

8 Q. And in your day-to-day work, have you become familiar with
9 the volume of music consumption over this time frame of 2000 to
10:27:19 10 2014?

11 A. Yes.

12 Q. And how so?

13 A. In additional reports that either I've seen come from the
14 RIAA or other published articles, there's reference made to the
15 number of hours that a consumer, you know, has committed and
16 how it's grown from 2000 through to today.

17 Q. What is your understanding of the volume of music
18 consumption from 2000 to 2014?

19 A. It has continued to increase year over year, and I think
10:27:58 20 towards the end of this chart, I believe consumers are
21 committing almost a week a year -- a week a -- sorry. A day a
22 week to consuming music.

23 Q. So how does that trend of music consumption compare to the
24 trend that's shown here about -- on recorded music revenues?

25 A. Well, in a normal business model, you would expect -- as

1 consumption grows, you would expect revenues to grow in line
2 with it. There may be some shifts as things go, but generally
3 the trend that we've seen with other formats as they've come in
4 is that you've seen revenue growth, not revenue decline.

5 Q. So how do you explain the revenue decrease over this time
6 period if music consumption is increasing over the same time
7 period?

8 A. At this same point in time where we made the turn of the
9 century is really when peer-to-peer piracy was starting to grow
10:29:04 10 at just increasing rates. And peer-to-peer piracy, by its
11 nature, is not a sale. It's actually -- it's stealing music.
12 None of those tracks that are being shared peer-to-peer are
13 being paid for.

14 And as a byproduct, artists, copyright holders,
15 union, and the rest of the people within the music industry
16 aren't being paid for those illegal transactions.

17 Q. And has Warner Music Group ever tried to calculate its
18 harm from peer-to-peer piracy?

19 A. We've not, other than on a macro -- you know, a macro
10:29:54 20 basis.

21 Q. And why haven't you calculated -- why haven't you been
22 able to calculate Warner Music Group's harm?

23 A. The nature of peer-to-peer piracy is it's viral, and
24 probably maybe the best way I can try and explain how viral it
25 works is if we use an example of a pebble going into a pond and

1 it's starting to create ripples. It's not about the first
2 transaction or the first infringement that takes place. Once
3 that track gets put up on a site that can be shared, it's then
4 shared amongst, you know, whoever wants to take it and whoever
5 then they share it with and they share it with.

6 So if you kind of think about that initial pebble
7 coming in, and then the next person taking it and their pebble
8 dropping in, it creates just these multiple waves. So the
9 viral nature of it, just trying to understand where that wave
10 stops is -- has not been -- it's not something that we've been
11 able to do.

12 Q. When users illegally download and distribute works on
13 these peer-to-peer networks, how do record companies get paid?

14 A. We don't because they're stolen and they don't -- they're
15 not paying anyone.

16 Q. And how did --

17 A. Including our artists, including our copyright holders,
18 including, you know, all of the other people within the chains,
19 the union musicians, the marketing people, and, you know, the
20 artists themselves. You know, ultimately no one is getting
21 paid from those transactions.

22 MS. NOYOLA: Thank you, Mr. Flott.

23 Pass the witness.

24 THE COURT: Cross-examination.

25 MR. BUCHANAN: Yes, Your Honor.

1 CROSS-EXAMINATION

2 BY MR. BUCHANAN:

3 Q. So the -- good morning, Mr. Flott.

4 A. Good morning.

5 Q. My name is Tom Buchanan. I have a few questions for you.

6 A. Okay.

7 Q. This -- the source of this information is your lobbying
8 group, RIAA; is that right?

9 A. It's our industry association, yes.

10:32:17 10 Q. And I think you said you're the executive vice-president
11 and CFO of Warner Music Group?

12 A. Of the Recorded Music Division.

13 Q. Okay. Did you prepare a chart like this like on a
14 quarterly or annual basis for your Board?

15 A. No, we would've leveraged this schedule since it's put
16 together for the overall industry.

17 Q. So the answer is, you did not present a chart like this to
18 your Board during this period of time?

19 A. I don't know during this period of time.

10:32:51 20 Q. Okay. When I say, this period of time, I'm talking about
21 2000 to 2014, those 14 or 15 years. Was this something that
22 you as the CFO of the company would typically would prepare and
23 present to the Board of Directors so they would know what was
24 going on in the market?

25 A. During this period of time from 2000 to 2006, I was not

1 with the company. And in 2014 is when I initially took the CFO
2 for Recorded Music job.

3 Q. Okay.

4 A. So it may have -- it may have been presented prior, but I
5 -- during this period of time, I would not -- I did not present
6 it.

7 Q. Okay. When did you start with the company?

8 A. Initially or?

9 Q. Initially.

10:33:36 10 A. 1983.

11 Q. Okay. And so, what period of time were you there from
12 2000 to 2014?

13 A. 2006 through 2014.

14 Q. Okay. So do you recall this type of data being presented
15 to the Board of Directors while you were there?

16 A. I don't know.

17 Q. You don't know? Did you ever do it?

18 A. I did not do it on --

19 Q. Okay.

10:33:58 20 A. -- you know, for the Board. They may have gotten it from
21 the existing management team at the time.

22 Q. Okay. So have you ever -- you prepared for this trial to
23 come in and testify, correct?

24 A. Yes.

25 Q. So this says RIAA. I am asking you now, did you go back

1 and try to determine from all the financial records that you
2 have access to by computer to determine whether this sort of
3 data was gathered considering its importance and present it to
4 the Board of Directors at any time?

5 A. I did not, no.

6 Q. Okay. So this is -- this covers the globe, right, this
7 data?

8 A. No.

9 Q. Okay. So these are U.S. sales, right, of your company?

10:34:45 10 A. No. This is U.S. sales of the recorded music.

11 Q. Okay. So what I'm getting at in terms of the impact of
12 piracy only, that would be global, right?

13 A. That's correct.

14 Q. Okay. So that would be China, India, the Far East, South
15 America, the entire world?

16 A. That's correct.

17 Q. Okay. Do you know what the impact of piracy by people
18 outside of the United States, how that impacted this?

19 A. Well, the United States is the largest market and has been
10:35:15 20 the largest market in the world for as long as I can recall.

21 And --

22 Q. So do you -- but there are, obviously, a lot of other
23 people out there with computers that could access music through
24 BitTorrent, correct?

25 A. Sure.

1 Q. There are billions out there, right?

2 A. Sure.

3 Q. Okay. I am wondering, does this in any way distinguish
4 between the impact of piracy on the sales of CDs or whatever
5 else and the peer-to-peer piracy? Does this chart capture the
6 impact of those people outside the United States versus those
7 in?

8 A. This chart wouldn't because it only reflects legitimate
9 sales.

10:35:57 10 Q. Okay. But the piracy, you're trying to capture the impact
11 of piracy on revenues, right?

12 A. That's correct.

13 Q. Okay. So if people outside the United States are
14 downloading music illegally, that doesn't distinguish between
15 the people who did it in the United States? This is just a
16 chart that shows the numbers going down.

17 So do you know who, in fact, is doing this, you know,
18 outside the United States? Do you have any idea of the impact
19 on peer-to-peer networks of illegal downloading outside the
10:36:28 20 United States during this time period?

21 MS. NOYOLA: Objection, Your Honor.

22 THE COURT: This document doesn't capture any piracy
23 numbers. So your question is confusing. Reframe it, please.

24 MR. BUCHANAN: Okay. All right.

25 BY MR. BUCHANAN: (Continuing)

1 Q. So this document just shows revenues for these different
2 types of products sold by your company and other record label
3 companies in the United States, correct?

4 A. That's correct.

5 Q. Okay. And the point you're making here, is it not, by
6 this chart is try to show the impact of piracy on sales?

7 A. All this chart does is reflects the trend, what has
8 happened to our revenues from 2000 to 2014 by the formats that
9 we operated.

10:37:08 10 Q. Okay. So you don't know what is driving this revenue
11 down? Say the great recession, 2007, 2008, 2009, you don't
12 have any idea how that impacted these particular sales that are
13 reflected on this chart?

14 A. Well, we do know that while -- well, we do know that if
15 you look at music consumption and in a normal business model,
16 you would not expect revenue decline in a period when you have
17 consumption increasing.

18 Q. Okay. So increased consumption could be someone goes on
19 iTunes, buys a song, listens to it all week long. How does
10:37:47 20 that affect the revenues on here, that increased consumption?

21 A. If someone goes to iTunes and buys a song, it's treated as
22 one sale.

23 Q. Right.

24 A. Regardless of how many times they listen to it, it's still
25 in this chart and would only be reflected as one song.

1 Q. Okay. And isn't that a very common way for people to
2 listen to music today or in the last five years, is on their
3 phones and with head pieces?

4 A. It is, but that consumption has changed from a download to
5 more of a streaming market as evidenced by the way the bars are
6 going.

7 Q. Right. And streaming is going up dramatically, it has
8 been going up dramatically for years, correct?

9 A. That's correct.

10:38:31 10 Q. And that is reflected on this chart?

11 A. That's right.

12 Q. And you're capturing revenue from streaming?

13 A. We are.

14 Q. Right. And that's a natural consequence, right? That
15 people that are switching from, say CDs, which are bulky and
16 cost a lot of money, to switch to streaming; isn't that true?

17 A. That's one, that's one factor. But while you -- while you
18 look at that, at the same time you would not expect in a market
19 where consumption is increasing, for your revenue to decrease.

10:39:00 20 We want to make sure that consumers have the ability
21 to enjoy their music in whichever medium and whichever format
22 they have. If you go back to when other formats have been
23 introduced over time, when the CD came in, when other formats
24 have come in, we have not seen a decline in revenue the way
25 that we're seeing here.

1 And if you look at the increase in peer-to-peer
2 activity and what it has done on consumption, you're not seeing
3 revenue correlate with the increased demand for music overall.

4 Q. So in terms of the decrease of CD sales in this chart,
5 isn't it true that there was an industry where people were
6 actually manufacturing CDs and basically stealing them?

7 A. That was a type of piracy similar to people buying
8 cassettes back in the '70s and '80s and creating their own mix
9 tapes.

10:40:14 10 Q. So is that reflected in this chart, the impact of piracy
11 on sales versus people's downloading music illegally versus
12 manufacturing illegally CDs?

13 A. Again, any illegitimate sale, any, you know, element of
14 piracy, whether it's physical piracy, whether it is download
15 piracy, whether it is -- now what we're dealing with is stream
16 ripping, none of those are sales. So we would not have
17 collected any revenue, paid our artists, and they wouldn't be
18 reflected within the revenue of this chart.

19 Q. So the illegal downloading that you've referenced, that
10:40:55 20 takes place by subscribers do that who are on ISPs who have
21 access to Internet service, correct?

22 A. Yes.

23 Q. Okay. And I believe in your deposition you said there are
24 sort of three approaches that you take to try to stop this --

25 MS. NOYOLA: Objection, Your Honor.

1 Q. Peer-to-peer, is one --

2 THE COURT: I'm sorry, there is an objection. Just
3 ask him straight out.

4 MR. BUCHANAN: Okay.

5 BY MR. BUCHANAN: (Continuing)

6 Q. Isn't it true that there are sort of three approaches that
7 you take at your company to try to stop this illegal
8 downloading, education, legislation, litigation, right?

9 A. That's correct.

10:41:33 10 Q. Okay. And your company for years sued individual
11 subscribers, did it not?

12 MS. NOYOLA: Objection, Your Honor, outside the scope
13 of direct.

14 THE COURT: Overruled. I will allow it.

15 BY MR. BUCHANAN: (Continuing)

16 Q. Isn't that true?

17 A. Yes.

18 Q. Okay. And how many years did you pursue that strategy of
19 suing individual subscribers?

10:41:54 20 A. I don't recall the specific, but for a number of years.

21 Q. Maybe ten? Do you know?

22 A. I don't know.

23 Q. Okay. And it didn't matter who the individual subscriber
24 was, whether it was a grandmother, a kid, a student, you would
25 sue them for illegal downloading, right?

1 MS. NOYOLA: Objection, Your Honor. The witness has
2 testified he doesn't know.

3 THE COURT: Yeah. Sustained.

4 BY MR. BUCHANAN: (Continuing)

5 Q. So do you know when you stopped that strategy of suing
6 individual subscribers?

7 A. I don't recall the specific year, no.

8 Q. Okay. Do you know why you stopped it?

9 A. Our preference has always been not to act to litigate.

10:42:31 10 Our preference would be to deal with education and with
11 legislation, and to, you know, work with those networks, the
12 ISPs, to make sure that their customers are educated and
13 understand that there are consequences to performing illegal
14 activity.

15 Q. So if your preference was education, why did you have a
16 campaign for at least five years of suing individual
17 subscribers?

18 MS. NOYOLA: Objection, Your Honor, again --

19 THE COURT: Sustained. Facts not in evidence. He
10:43:05 20 just said he didn't know how long. So revise your question,
21 please.

22 BY MR. BUCHANAN: (Continuing)

23 Q. So forget the years part. You testified that you had a
24 campaign where you sued individual subscribers for a number of
25 years, you don't know how many.

1 And so I am saying, at what point in time did you
2 decide -- did the company decide the preference wasn't to sue
3 individual subscribers but to educate?

4 A. Well, all three of those go hand in hand. You know,
5 education, legislation, and litigation. Our preference was not
6 to go through and to litigate. But, you know, at that
7 particular point in time there was a question as to the
8 legality of the point. So we had to protect our artists'
9 rights, and we needed to make sure that individuals understood
10:44:03 10 that if they were -- if they were stealing, that they needed to
11 understand that there were consequences.

12 You wouldn't, you wouldn't walk into -- I don't think
13 anyone would think that if you walked into a car dealership and
14 they gave you the keys, that you could just drive off. And
15 intellectual property is not any different than that.

16 Q. So my question is, as you said, you had legislation,
17 education, and litigation. So we talked about the litigation
18 against individual subscribers.

19 What were you doing education-wise while the campaign
10:44:38 20 to sue individual subscribers was going on?

21 A. The RIAA had a number of different programs. We have
22 information that was put within our CDs, information on our
23 website.

24 So I know that I, myself, you know, would talk to my
25 kids' friends who would come over and try and get them to

1 understand that it's stealing. And, you know, it was not the
2 most comfortable conversations in my house with their friends,
3 and some of them wouldn't come back.

4 Q. So isn't the reason -- isn't the reason that your company
5 stopped suing individual subscribers, file sharers, is because
6 of the bad publicity?

7 A. No.

8 Q. You don't believe that's the case at all?

9 A. I believe that our strong preference is not to litigate
10:45:38 10 and -- but we also needed to make sure that individuals
11 understood the consequences of doing things illegally. And
12 we've tried to move forward from there and, you know, continue
13 with education and legislation.

14 Q. So part of that education process was when your company
15 and the other record labels entered into the Copyright Alert
16 System with five of the major --

17 MS. NOYOLA: Objection, Your Honor, outside the
18 scope. And counsel is testifying as to facts not in evidence.

19 MR. BUCHANAN: It's cross.

10:46:17 20 THE COURT: I am going to allow it. It is beyond the
21 scope of direct examination. I will allow you to redirect if
22 you think it's appropriate.

23 If he is aware of it.

24 MR. BUCHANAN: Right.

25 BY MR. BUCHANAN: (Continuing)

1 Q. So you talked about education being important?

2 A. Yes.

3 Q. And the Copyright Alert System was based not on litigation
4 but on education, right?

5 A. Yes.

6 Q. Okay. And your company and other record label companies
7 spent years studying the ability for the CAS program to work,
8 right, before they entered into these memorandum of
9 understandings?

10:46:57 10 A. I believe so.

11 Q. Okay. And so, did you look at any of the due diligence
12 that was done by the record label companies before they entered
13 into CAS, the data that went into it, to indicate that this
14 education system by using notices versus termination or
15 litigation would work?

16 A. I didn't, but it's not in my area of responsibility.
17 That's, you know, for our business and legal affairs team.

18 Q. Right. But the decision to enter into CAS was very
19 important to your shareholders and to your artists, right?

10:47:34 20 A. Yes.

21 Q. Because you were making a decision as a company, along
22 with the other record label companies, to stick with alerts and
23 notices and not termination or litigation, right?

24 MS. NOYOLA: Objection, Your Honor, foundation.

25 THE COURT: Yeah, there's no foundation. Sustained.

1 BY MR. BUCHANAN: (Continuing)

2 Q. Okay. Do you understand CAS, that it didn't require
3 termination, right?

4 A. I have a general understanding of it. Our legal
5 department is really the area where that is handled.

6 Q. Okay. So you understand with an education program, it
7 didn't require termination of a subscriber, right?

8 MS. NOYOLA: Objection, vague, Your Honor.

9 A. I don't know that.

10:48:12 10 THE COURT: Okay. He answered. He said, I don't
11 know.

12 BY MR. BUCHANAN: (Continuing)

13 Q. All right. So again, you agree, though, that this was a
14 major step because you're basically foregoing litigation and
15 you're going toward education with the ISPs, right?

16 A. I don't think we were foregoing litigation. Our
17 preference was to go education.

18 Q. Okay.

19 A. But, again, it's not my area of responsibility.

20 Q. Right.

21 A. It's the responsibility of our general counsel and our
22 business and legal affairs department.

23 Q. So are you aware that under CAS, they would -- the ISPs
24 would collect all the data that came in from the -- as to the
25 subscribers, all the notices per subscriber per day, and they

1 would collect that data and they would send it back to your
2 company?

3 MS. NOYOLA: Objection, Your Honor, same issue,
4 foundation.

5 THE COURT: Yeah, let's --

6 MS. NOYOLA: He has already asked and answered that
7 he doesn't have any familiarity --

8 THE COURT: Stop, stop. Do you understand the
9 question? The specifics of the -- he's indicated he doesn't
10:49:26 10 have any personal familiarity, it's not his area of the
11 company. And you're hitting with a pretty broad question.

12 MR. BUCHANAN: Okay.

13 THE COURT: So ask him whether he's familiar with
14 what CAS was doing with any data.

15 BY MR. BUCHANAN: (Continuing)

16 Q. So I'm asking you, as the CFO of Warner Music Group, did
17 you get any data pursuant to CAS, either you or anyone in the
18 company, pursuant to CAS that showed the effectiveness of this
19 education program that was so important to your artists?

10:50:05 20 A. So just to correct, the CFO for Recorded Music, not Warner
21 Music.

22 Q. Okay.

23 A. It is possible it went into our legal department. I don't
24 have knowledge of whether we received it or what was done with
25 it.

1 Q. So you were deposed in this case, correct?

2 A. Yes.

3 Q. And you prepared for your testimony here today, right?

4 A. I did.

5 Q. So is it -- and you're saying that in doing both of those
6 things, you never looked at the data that you got pursuant to
7 this CAS program from the ISPs to see if it was effective --

8 MS. NOYOLA: Objection, asked and answered.

9 Q. -- and that they were actually stopping --

10 THE COURT: Hold on.

11 BY MR. BUCHANAN: (Continuing)

12 Q. They were actually stopping infringement --

13 THE COURT: Overruled.

14 BY MR. BUCHANAN: (Continuing)

15 Q. Did you --

16 THE COURT: He may answer.

17 THE COURT REPORTER: I'm sorry, Your Honor.

18 THE COURT: Yeah, I apologize. If you understand the
19 question.

20 But he wasn't the CFO at the time during CAS, so
21 let's be clear about that as well.

22 MR. BUCHANAN: Right.

23 THE COURT: But back in -- if you want to direct him
24 to 2010 and ask him whether he was aware -- go ahead.

25 BY MR. BUCHANAN: (Continuing)

1 Q. So do you know if the data that CAS was collecting on the
2 effectiveness of this education program to protect the rights
3 of all these artists you talked about, whether that was
4 provided to your company?

5 A. I don't personally know.

6 Q. Have you attempted to look for that information as part of
7 your coming into court today and to testify to the Court and
8 the jury?

9 A. My understanding was that's not what I was being asked to
10 be here to testify to.

11 Q. Okay. So are you aware of the members of CAS, that it was
12 Verizon, and Comcast, Cablevision, Time Warner, AT&T?

13 A. Again, I have a general understanding of CAS. I don't
14 have the specific understanding of CAS.

15 Q. Did you know that those companies were the other members
16 with your company and the other record label companies that
17 made up CAS?

18 A. Again, I don't know. So I'm not going to say that I do
19 know. I apologize.

20 Q. Would you agree that -- you just gave an example about
21 someone going into a used car dealership or something and
22 stealing a car.

23 So would you agree that if those five, those five
24 ISPs that were part of CAS, whether -- if they were basically
25 for five years given the opportunity to process notices but not

1 terminate anybody for five years, would that not create a
2 market for infringement?

3 THE COURT: That was a totally improper question.
4 And the objection is sustained.

5 Let's move on.

6 MR. BUCHANAN: Okay.

7 BY MR. BUCHANAN: (Continuing)

8 Q. So do you have any idea of -- you know, you talked about
9 in that chart what you believe is the impact of illegal
10 downloading on U.S. sales. And do you recall you testified
11 that you believed that consumption was going up and that
12 American citizens were the main people that are consuming music
13 in the world comparatively; is that right?

14 A. I believe what I said is the U.S. is the largest
15 territory. But this schedule here just reflects the U.S.
16 recorded music business.

17 Q. And so, for a U.S. -- person in the United States to
18 illegally download music, they would have to use an ISP in the
19 United States, right?

20 A. That would be one way that they could, yes.

21 Q. So did you attempt to determine how much of the illegal
22 downloading took place during the five years of CAS by the five
23 ISPs that were part of CAS?

24 MS. NOYOLA: Objection, Your Honor.

25 THE COURT: Sustained.

1 MR. BUCHANAN: Okay.

2 BY MR. BUCHANAN: (Continuing)

3 Q. Do you know if there was any information about -- and you
4 may not know this either, but with regard to CAS, any data, was
5 it -- do you know if it was ever shared with the artist?

6 MS. NOYOLA: Objection. Your Honor, we would like a
7 sidebar.

8 THE COURT: I'm sorry?

9 MS. NOYOLA: We would like a sidebar, please.

10 THE COURT: Yes.

11 NOTE: A sidebar discussion is had between the Court
12 and counsel out of the hearing of the jury as follows:

13 AT SIDEBAR

14 MS. NOYOLA: Your Honor, Mr. Buchanan has had some
15 questioning of the witness material times on CAS, and he's
16 already testified that he has no personal knowledge about the
17 specifics of CAS. And he was not CFO during the negotiations
18 of the CAS.

19 THE COURT: Where are you going?

20 MR. BUCHANAN: Well, where I was going is he
21 basically testified as an expert about, you know, the music
22 industry, how it was going down, the impact of piracy, the
23 American consumption of music, even though he is the CFO for
24 this short period of time. So how does he get all of that
25 information? Okay. The RIAA gives it to him. And he makes

1 this chart.

2 What I'm trying to show is, well, look, if that's so
3 important, okay, if it's the ISPs out there that are allowing
4 this infringement, what are you doing with regard to the five
5 that you didn't take any action against and you basically gave
6 them a free pass? That created a market for everybody to go
7 to, arguably --

8 THE COURT: Yeah, but he doesn't have that
9 information.

10 MR. BUCHANAN: Okay.

11 THE COURT: I mean, he's different than the other
12 people who were up here. He is a CFO -- and he wasn't the CFO
13 during the CAS period of time.

14 MR. BUCHANAN: Right.

15 THE COURT: He has answered. I mean, frankly, I
16 thought you had been asking these questions just so I'll object
17 and it will somehow look like I'm trying to preserve the
18 witness from having to testify.

19 MR. BUCHANAN: No, no.

10:56:18 20 THE COURT: But this is way off his plate.

21 MR. BUCHANAN: Okay. All right.

22 THE COURT: So your objection is sustained. Let's
23 move on to something else.

24 MR. BUCHANAN: All right.

25 MR. OPPENHEIM: Does this mean there will be no

1 further questions on CAS with this witness? Because this has
2 become --

3 THE COURT: Yes, yes, no more CAS.

4 NOTE: The sidebar discussion is concluded; whereupon
5 the case continues before the jury as follows:

6 BEFORE THE JURY

7 THE COURT: I was trying to finish up this witness
8 before our break, but would you like a break now or --

9 A JUROR: I could use it.

10:56:54 10 THE COURT: You would like a break now?

11 Okay. All right. Let's take 15 minutes right now.
12 We have got a couple of heads shaking that they would like it
13 now.

14 So let's take 15 minutes and we'll come back.

15 NOTE: At this point the jury leaves the courtroom;
16 whereupon the case continues as follows:

17 JURY OUT

18 THE COURT: All right. Anything before we break?

19 MR. BUCHANAN: No, Your Honor.

10:57:37 20 THE COURT: Okay. Then we're going to take
21 15 minutes.

22 Mr. Flott, you're in the middle of your testimony, so
23 don't discuss the testimony you've given so far while you're on
24 break. All right, sir?

25 All right. Thank you.

1 All right, we're in recess.

2 NOTE: At this point a recess is taken; at the
3 conclusion of which the case continues in the absence of the
4 jury as follow:

5 JURY OUT

6 THE COURT: All right. Are we ready for our jury?

7 MS. NOYOLA: Your Honor, we wanted to raise an issue
8 regarding the scope of Mr. Buchanan's cross-examination. We
9 understand he may raise some questions about current streaming,
10 current -- and Warner Music's current revenues.

11 We do not believe these are relevant to the issues in
12 the case. It is outside the bounds of the direct examination,
13 outside the bounds of this case.

14 THE COURT: So present day streaming numbers?

15 MR. BUCHANAN: Well, the witness testified that
16 streaming -- when it started and how it progressed, and it came
17 up to the present.

18 THE COURT: And he had the graph.

19 MR. BUCHANAN: In addition, Dr. Lehr has all this
11:17:19 20 comparisons between the current value of Cox, you heard that in
21 opening, how much we were worth. And so, you know, we have a
22 right to compare what these companies are worth.

23 THE COURT: Hasn't this testimony already came in --
24 come in for the other plaintiffs in the case?

25 MR. OPPENHEIM: Not the current -- so I think the

1 issue is current revenues and streaming revenue, not relevant.

2 Cox's revenues are clearly relevant under the factors
3 for statutory damages. But the plaintiffs, during the time at
4 issue, absolutely. But beyond the time at issue, not.

5 At a high level, do we care? But it's outside the
6 scope. But I believe that what's going to be elicited here,
7 just based on some documents that we are seeing, is we are in
8 the trends of streaming revenues now and what's happening. And
9 all of what happened after 2014 in terms of revenue trends, is
10 outside the scope of this case.

11:18:17

11 MR. ELKIN: Your Honor, very briefly, not to rehash
12 everything.

13 THE COURT: Mr. Elkin.

14 MR. ELKIN: I don't think that Mr. Buchanan is going
15 to get very much into this, really if at all, but I just want
16 to put a bookmark here. It has come in through Kooker, it has
17 come in through other witnesses. Quite a number of witnesses
18 so far have either touched upon it directly or indirectly.

11:18:44

19 As I mentioned when this issue cropped up earlier in
20 the trial, I do think to the extent they are seeking willful
21 copyright infringement and seeking statutory damages,
22 deterrence is an issue. The market has changed, I don't think
23 it's really in dispute.

24 I don't want to belabor the other points, I just
25 wanted to make sure that we had that reminder.

1 THE COURT: Okay. Thank you.

2 MR. OPPENHEIM: One last point, if I may, Your Honor.

3 THE COURT: Yeah.

4 MR. OPPENHEIM: In the opening, if we could just pull
5 up the slide, this is the slide that was put up in the opening
6 by Cox.

7 THE COURT: I understand. And I allowed the general
8 revenues to come in for the point that Mr. Elkin just made,
9 which is the industry has gone away from P2P -- that's a
10 misstatement.

11 The industry has moved on to different ways to
12 transfer digital music, and that it may relate to whether or
13 not there is a likelihood of future infringement given the
14 marketplace.

15 So if it's not clear to you what I just said --

16 MR. OPPENHEIM: So if what Your Honor is getting at
17 is the issue of deterrence under the -- as one of the factors
18 in statutory damages --

19 THE COURT: Right.

11:20:12 20 MR. OPPENHEIM: -- what the current revenues
21 structure is for the plaintiffs is not a reflection of the harm
22 that is potentially done from a particular type of piracy.

23 So let's say we had a new format, and that new format
24 was USB hard drives that got sold in stores. That would be
25 entirely -- you know, if it happens after the point in time, it

1 is irrelevant to the question of the deterrence of Cox.

2 The peer-to-peer piracy may be the reason that
3 downloads are down. I mean, they could elicit that. But going
4 into what a new format is is entirely irrelevant.

5 All they are trying to do is say, look, these
6 companies are now making a lot of money because they are
7 finding ways to deal with the piracy that we're allowing.
8 That's not a place this case should go.

9 THE COURT: Well, it is of marginal relevance. I'll
11:21:07 10 allow you to ask whether he is aware of the revenues, whether
11 they have recovered using different methods, and then let's
12 move on. Okay?

13 All right, thank you. Your exception is noted --

14 MR. OPPENHEIM: Thank you, Your Honor.

15 THE COURT: -- Mr. Oppenheim.

16 All right. Let's get our jury, Joe.

17 NOTE: At this point the jury returns to the
18 courtroom; whereupon the case continues as follows:

19 JURY IN

11:22:02 20 THE COURT: All right. Please have a seat.

21 And let's continue, Mr. Buchanan.

22 BY MR. BUCHANAN: (Continuing)

23 Q. A few more questions, sir.

24 On this chart, it starts in 2000, correct?

25 A. Yes.

1 Q. And 1999 was the advent of Napster; is that correct?

2 A. In that area, yes.

3 Q. Okay. And in 2001 you had iTunes and Apple?

4 A. No, it -- iTunes started late 2003, early 2004.

5 Q. Okay. And that led to what they call the disaggregation
6 of the album, the CD album, correct?

7 A. It created a different format.

8 Q. Right. And the format was you could now pick and choose
9 whatever individual song you wanted, you didn't have to go buy
10 a CD with 26 songs that cost 25 bucks; isn't that right?

11 A. If a consumer chose to do that, yes, but they still had
12 the ability to buy music in whichever way that they wanted to.

13 Q. Right. But they could make a choice between going on to
14 iTunes and paying a dollar for their favorite song versus going
15 to a record store and paying \$25 for an album that had 25 songs
16 and really only wanted one, right?

17 A. That is -- was their option, yes.

18 Q. So one of the other things that, as I understand it, that
19 your company did to counter the loss of CD sales due to piracy
20 and downloading was to sign artists up to what they call

21 360 deals; is that right?

22 A. That's correct.

23 Q. And they involved basically trying to find artists at the
24 beginning of their career and then expanding the rights that
25 your company would own vis-à-vis that artist, right?

1 A. We approached artists, not just at the beginning of their
2 career, but during their career as well.

3 Q. But the 360 deals, didn't you sort of use those to expand
4 the rights that would be owned by your company versus the
5 artists' rights, right?

6 A. They still were the artists' rights, we just created
7 whatever the contractual relationship would be as to how much
8 they would get paid from us working those rights for them.

9 Q. Okay. So it basically -- and I read this in the financial
11:24:32 10 statement about these expanded rights, what it meant was that
11 you then would have a greater return of the return on their
12 product, correct?

13 A. That's not necessarily the case. You would have to look
14 at each right and how we shared those different revenues.

15 Q. Okay. So -- but isn't it true that under these 360 deals,
16 you went to artists and you then tried to capture an interest
17 in more of what you were doing for them to increase revenues
18 for your company?

19 A. We didn't do anything that any business would do. We were
11:25:10 20 trying to acquire the maximum amount of rights that we could --

21 Q. Okay.

22 A. -- and they benefit both the artist and ourselves.
23 Ultimately, it's the artist's decision as to whether they
24 wanted to sign up with us and have us work those rights for
25 them.

1 Q. Right. So you talked about the work you do for artists.
2 It's true that you had disputes over ownership and collections
3 with your artists over the years, haven't you?

4 MS. NOYOLA: Objection, Your Honor, outside the
5 scope.

6 THE COURT: Sustained.

7 MR. BUCHANAN: Okay. Your Honor --

8 THE COURT: This whole field is off.

9 BY MR. BUCHANAN: (Continuing)

11:25:53 10 Q. Okay. So I want to ask you some questions about the
11 financials of the company. And I have -- do you have a binder
12 there?

13 First of all, Warner Music Group, you are owned by
14 Access Industries; is that correct?

15 A. Currently, yes.

16 Q. And that's a private equity company?

17 A. Yes.

18 Q. Okay. And who is the major shareholder in that company?

19 A. Len Blavatnik.

11:26:33 20 Q. And he is a Ukranian; is that right?

21 MS. NOYOLA: Objection, Your Honor.

22 THE COURT: Relevance is sustained. I said you could
23 get into the revenues in just kind of a conclusory manner, and
24 you may do that, please.

25 BY MR. BUCHANAN: (Continuing)

1 Q. And do you know what price that Access Industries paid for
2 Warner Music Group?

3 MS. NOYOLA: Objection, Your Honor.

4 THE COURT: You may answer the question if you know.

5 A. It was a little over \$3 billion.

6 BY MR. BUCHANAN: (Continuing)

7 Q. Okay. And when did that take place?

8 A. I believe it was July of 2011.

9 Q. Okay. And what is the approximate worth of your company
10 today?

11 A. We don't -- we don't trade external debt. So you would --
12 if you are asking me just about the Recorded Music Division
13 versus overall Warner Music Group?

14 Q. What is -- do you know what the current value is of Warner
15 Music Group?

16 A. I don't because it -- there is multiple factors that would
17 go into what the value would be currently.

18 Q. That is not something that you calculate for the Board or
19 for the --

11:27:55 20 A. I don't. The corporate, the corporate group does that.

21 Q. All right. But you don't know that information?

22 A. I -- you know, there are different valuations that are
23 done at different points in time. I don't have the current
24 value.

25 Q. So you understand that the claim period here is

1 February 2013 through November 2014; is that right?

2 A. That's my understanding.

3 Q. All right. And do you know the amount of revenue that WMG
4 generated for the fiscal year 2014?

5 A. I believe it's in one of these documents, right?

6 Q. Right. So I can show you the document, but is it about
7 \$3 billion? Would that be about right?

8 A. Again, I would want to look at the exhibit.

9 Q. Okay. That's fine. Why don't you look at tab 6.

11:28:46 10 A. Okay.

11 Q. And see if you can -- I would look at page 44, the big
12 number down at the bottom, DX 2844.

13 A. Okay.

14 Q. Do you see the Total Revenue column?

15 A. I do.

16 Q. It says for 2014, three billion?

17 A. I do.

18 Q. And then 2013, 2.8 billion?

19 A. That's correct.

11:29:22 20 Q. And for 2012, 2.7 billion; is that correct?

21 A. 2.8, yes.

22 Q. All right. Now, you mentioned streaming before.

23 Streaming is a large, significant part of the revenue that has
24 been coming into the company for the last two or three years,
25 is it not?

1 A. It is.

2 Q. Okay. And do you know how much -- the percentage that
3 revenue from streaming has gone up over, say, the last year or
4 two?

5 A. The last year being which period of time?

6 Q. Say 2019, are you aware that the streaming revenue was up
7 23 percent in 2019 over 2018?

8 A. That sounds like it's right from our external reporting we
9 just did.

11:30:17 10 Q. Right. And for streaming, active streaming, for people to
11 stream, they need a high speed internet service, correct?

12 A. They don't have to have it, but it makes the experience
13 better if they do.

14 MR. BUCHANAN: I think that's all the questions I
15 have. Thank you.

16 THE COURT: All right. Redirect.

17 REDIRECT EXAMINATION

18 BY MS. NOYOLA:

19 Q. Mr. Flott, as chief financial officer for Warner Music
11:30:57 20 Group, what sort of information do you regularly provide to the
21 Board of Directors?

22 A. We provide the performance of the company on a periodic
23 basis. Normally looking at kind of current quarter and our
24 fiscal years to date. And comparing that as well to our prior
25 periods on either an as-reported or a constant-currency basis.

1 Q. Does the information you provided to the Board include
2 market trends?

3 A. It does.

4 Q. Why do you as chief financial officer look at music
5 consumption levels and compare that to revenues?

6 A. Based on normal consumption, we are trying to determine
7 whether or not the market is growing. And it gives us an
8 indication as to whether we are growing at the same level or
9 whether there are other factors impacting our growth.

11:32:07 10 Q. Do you recall some questions regarding CD piracy?

11 A. That's correct.

12 Q. How does CD piracy compare to the peer-to-peer piracy that
13 is at issue in this case?

14 A. If you look at kind of CD piracy, it's a -- it's having to
15 do with a physical copy and, you know, it is a, you know, a
16 machine-to-machine basis.

17 Peer-to-peer, it can be done in almost any digital
18 format through phone, through computer, through tablet, through
19 any other sources, and then can spread. You know, it's a
11:32:59 20 virtual copy that then can be spread and shared seamlessly and
21 much easier than CD piracy.

22 Q. And with peer-to-peer piracy, how can you tell how many
23 copies are further made or distributed after that first copy?

24 MR. BUCHANAN: I am going to object, Your Honor. I
25 don't think he is an expert in this area. He already went

1 through this.

2 THE COURT: Lay a foundation.

3 MS. NOYOLA: I will move on to the next question.

4 BY MS. NOYOLA: (Continuing)

5 Q. Do you recall your testimony, your being asked questions
6 about the prices of CDs back in the '90s and early 2000s?

7 A. Yes.

8 Q. What was the general price point of CDs during that time
9 frame?

11:33:42 10 A. There really wasn't a general price point. If you looked
11 at between box sets, which could be sold in, you know, the
12 upper hundred dollars to a normal -- if you took a standard CD,
13 it would sell probably somewhere in the 15 to \$16 range per, at
14 retail.

15 Q. If we could please pull up PX 486.

16 Mr. Flott, where on this chart does it reflect
17 peer-to-peer piracy levels?

18 A. It doesn't.

19 Q. You can take that down.

11:34:35 20 Counsel asked you some questions about a transaction
21 between Access Industries and the acquisition of Warner Music
22 Group. Do you recall a three billion number?

23 A. Yes.

24 Q. What did that three billion transaction cover in terms of
25 the geographical areas and the divisions of Warner Music Group?

1 A. It covered the world. It also encompassed all of the
2 companies within Warner Music, which is the Recorded Music
3 Division as well as the Music Publishing Division, and the
4 companies that exist underneath each of those divisions.

5 Q. And a similar question with respect to the 10k that
6 Mr. Buchanan asked you about. I believe that you provided some
7 numbers regarding the total revenues --

8 A. Yep.

9 Q. -- over 2012 to 2014; is that right?

11:35:30 10 A. Yes.

11 Q. And what geographical areas did those revenues cover?

12 A. That's the world.

13 MS. NOYOLA: No further questions, Your Honor.

14 THE COURT: All right.

15 MR. BUCHANAN: I just would move in DX 28, Your
16 Honor.

17 THE COURT: Any objection to DX 28?

18 MS. NOYOLA: That's fine, Your Honor.

19 MR. OPPENHEIM: No objection, Your Honor.

11:35:51 20 THE COURT: It will be received.

21 All right. May Mr. Flott be excused?

22 All right, you are excused with our thanks, sir.

23 Please don't discuss the testimony you have given with anyone
24 until our trial is over. All right?

25 THE WITNESS: Okay.

1 THE COURT: All right. Have a good day.

2 THE WITNESS: Thank you.

3 NOTE: The witness stood down.

4 THE COURT: All right. Next witness.

5 MR. OPPENHEIM: Your Honor, at this point the
6 plaintiffs and the defendants have agreed to the deposition of
7 Mr. Zabek.

8 THE COURT: Okay.

9 MR. OPPENHEIM: So we will play it. It includes,
11:36:23 10 obviously, both sides.

11 THE COURT: All right. So we are going to hear
12 testimony by deposition. And Mr. Zabek's deposition was taken
13 in lieu of his appearing here in court. You should consider it
14 just the way you would consider the testimony of a live
15 witness.

16 All right. Are you all set up?

17 And again, it's a witness that is being called by
18 plaintiffs, but also giving testimony on behalf of Cox as well.
19 So it's a witness for both the plaintiff and defendant.

11:37:06 20 MR. GOULD: Your Honor, would it be helpful to give
21 the jury a sense of how long this video might go so they can
22 mentally prepare for it?

23 THE COURT: Sure.

24 MR. GOULD: This video is approximately four hours
25 long.

1 THE COURT: Four hours?

2 MR. GOULD: Roughly, four hours. A little more than
3 half is information that the plaintiffs designated, and a
4 little less than half is the information that the defendants
5 have designated.

6 MR. OPPENHEIM: It's about three-and-a-half, not
7 four. If you believe that it started much longer, we have
8 reduced it down to that.

9 Also, Your Honor, there are documents in the
10 deposition --

11 THE COURT: Right.

12 MR. OPPENHEIM: -- which I believe have been
13 integrated into the video, so the jury will see them. We would
14 just move the admission of all of the documents for both sides
15 at this point in time so that they are in, and the jury can see
16 them. And there is no issue about them.

17 MR. ELKIN: No objection, Your Honor.

18 THE COURT: All right. Then they will all be -- each
19 be received. And you'll keep a record of them?

11:38:06 20 MR. OPPENHEIM: We will give you a list.

21 THE COURT: All right. Thank you.

22 MR. OPPENHEIM: Absolutely, Your Honor. There you
23 go.

24 Could you use a smaller piece of paper?

25 MR. GOULD: Everyone is a critic.

1 MR. OPPENHEIM: Can we go ahead and start it?

2 THE COURT: Yes, sir.

3 MR. GOULD: Someone brought popcorn?

4 THE COURT: Yeah. If you'd cut it down to two hours,
5 I would have done popcorn, but not if you're going to keep it
6 at this.

7 NOTE: The testimony of Mr. Jason Zabek via video
8 deposition is played into the record as follows:

9 EXAMINATION

10 BY MR. OPPENHEIM:

11 Q. Mr. Zabek, the court reporter will swear you in now.

12 NOTE: The deponent is sworn.

13 Q. Good morning, Mr. Zabek.

14 A. Good morning.

15 Q. Did you discuss with counsel the possibility of testifying
16 in this trial?

17 A. Yes, we had talked about that.

18 Q. And do you -- are you willing to testify at trial if
19 asked?

11:39:03 20 A. If asked, of course.

21 Q. How old are you?

22 A. 50.

23 Q. Could you just briefly tell us what your educational
24 background is, please.

25 A. I have a high school diploma.

1 Q. Okay. No college education?

2 A. No. Couple of classes here and there, but I wasn't lucky
3 enough to go.

4 Q. So I'm going to hand you what is going to be marked as
5 Plaintiff's Exhibit 254.

6 A. Thank you.

7 Q. Is this a copy of the separation agreement that you were
8 just referring to?

9 A. Yes, it looks like it.

11:40:04 10 Q. I will note that this separation agreement does not
11 contain a signature. Do you see that on the second -- the
12 third page?

13 A. Yes.

14 Q. Did you ever sign this agreement?

15 A. Yes.

16 Q. Do you believe that this agreement is currently in effect?

17 A. To the best of my knowledge, I believe it is.

18 Q. Are you aware of Cox not fulfilling any of their promises
19 to you in this agreement?

11:40:26 20 A. No. They fulfilled everything that I know of.

21 Q. Under the second paragraph, Cox was obligated to pay you a
22 \$50,000 sum payment; is that correct?

23 A. Yes.

24 Q. And they did that on the basis of your resignation,
25 correct?

1 A. Yes.

2 Q. And did they make that payment to you?

3 A. Yes, they did.

4 Q. Do you believe that you have an obligation under this
5 agreement to provide testimony in this case if Cox so requests?

6 A. I believe that is true.

7 Q. Do you know whether Cox is paying for your counsel?

8 A. It is my understanding that they are.

9 Q. And for your time here today, are you being compensated in
11:41:16 10 any way?

11 A. No, I am not.

12 Q. Are you being reimbursed?

13 A. No, I am not.

14 Q. And, in fact, in paragraph 6, the agreement you agreed to
15 says that you: Agree that you will not engage in any conduct
16 or activities detrimental to the best interests of Cox, its
17 owners, affiliates, or subsidiaries, including, but not limited
18 to, any disparaging, denigrating, or untrue statements about
19 Cox or about any employee of Cox or its owners, affiliates, or
11:41:44 20 subsidiaries, correct?

21 A. That is what is stated here, yep.

22 Q. And you agreed to that, right?

23 A. When I did sign, yes.

24 Q. So you understand as you testify today you are not
25 permitted to denigrate Cox; is that correct?

1 A. I do understand what you're saying and everything, but,
2 you know, it does not mean that I can't come in and tell you
3 what happened and tell you the truth.

4 Q. But you understand as you testify today, you are not
5 permitted by contract to disparage or denigrate Cox, correct?

6 A. I do understand that, but I don't have much to say
7 disparaging them.

8 Q. And you understand that if you did say something that were
9 disparaging, you would potentially put at risk the \$50,000
11:42:24 10 payment that you received from Cox, correct?

11 A. I do understand that.

12 Q. You began working for Cox Communications in 1991, correct?

13 A. I believe so, yes.

14 Q. And your first role was doing customer service, correct?

15 A. Yes, sir.

16 Q. And you did that for roughly six years, right?

17 A. Yeah, approximately about six years.

18 Q. And then you moved to sales and marketing, correct?

19 A. Yes, I did.

11:42:48 20 Q. And you did that for roughly two years, correct?

21 A. Yeah, I think so. To the best of my knowledge, yes.

22 Q. And then you became a field service representative, right?

23 A. Yes.

24 Q. And in that job, you would install modems and hook up
25 subscribers' computers, correct?

1 A. Yes, sir.

2 Q. And you did that for roughly two years, correct?

3 A. Yes, about two years.

4 Q. And then you moved into business technical support,
5 correct?

6 A. Correct.

7 Q. And you did that for roughly four years, correct?

8 A. I would say approximately, yeah.

11:43:28 9 Q. And after that you became a Level 1 abuse engineer,
10 correct?

11 A. Yes.

12 Q. And in that job you handled complaints against
13 subscribers, including copyright infringement notices, correct?

14 A. In that position, I did.

15 Q. And you would often refer to those complaints as DMCA
16 complaints, correct?

17 A. Yeah. It was a shorter way to describe it, absolutely,
18 quicker than saying, you know, copyright complaint, of course.

11:43:57 19 Q. And you served as a Level 1 abuse engineer for
20 approximately three to four years, correct?

21 A. Yeah, somewhere around that time.

22 Q. And after that you were promoted to becoming the lead
23 abuse engineer, correct?

24 A. I was.

25 Q. And then after that, you were promoted to become the

1 manager of the abuse group, correct?

2 A. Correct.

3 Q. So over the course of your career at Cox, you received
4 many promotions, correct?

5 A. Several, yeah.

6 Q. As the manager of the abuse group, you oversaw that group,
7 correct?

8 A. Uh-hum.

9 Q. Yes?

11:44:27 10 A. Yes.

11 Q. And your deputy within that group was a gentleman by the
12 name of Joseph Sikes, correct?

13 A. He was one of our probably -- yeah, high level folks. I
14 would call my right-hand person. It was not an official title
15 or anything like that, but it was -- we would brainstorm and
16 things like that. But we do that with the whole group also,
17 too. But while I was out or possibly maybe on vacation or
18 anything like that, I would -- Joe would be in charge.

19 Q. And you also worked closely with Matt Carothers, correct?

11:45:01 20 A. Yes.

21 Q. Now, Matt Carothers had previously held the position of
22 being manager of the abuse group at some point, correct?

23 A. I believe he was the manager, yes, when I first, first
24 started, when I first came to Atlanta, yeah.

25 Q. And Mr. Carothers is the individual who originally built

1 the CATS system, correct?

2 A. It was his brainchild.

3 Q. And at one point you would refer to you and Mr. Sikes and
4 Mr. Carothers as the Axis of Evil, correct?

5 A. I think there was a presentation that I had brought out
6 where we were -- yeah, we had a demographic such as that, and
7 it was -- it was to bring levity to, of course, the thing. We
8 were stopping nefarious hackers and bad people on the Internet.

9 Q. And in that presentation you need to refer to the three of
10 you as the Axis of Evil, correct?

11 A. Sure.

12 Q. Did you agree to resign in lieu of being fired?

13 A. When I signed the paper, yes.

14 Q. And you -- but you didn't believe that you had any choice
15 but to sign the paper, otherwise you wouldn't continue to be
16 employed at Cox, correct?

17 A. I think there is always a choice. I think that -- yeah, I
18 think there is always a choice. But I think it might have been
19 the choice that was right for myself and the company.

11:46:30 20 Q. Do you believe, with the benefit of hindsight, that it was
21 appropriate for you to have left?

22 A. I don't. I don't.

23 Q. And why is that?

24 A. We had been doing this job for quite a period of time and
25 had a lot of successes in areas, a lot of compliments. We took

1 down a lot of botnets for organized crime, partnered with law
2 enforcement around the world, taking down absolute criminal
3 organizations, and compliments from the FBI, Interpol. So,
4 yeah.

5 Q. So you felt like you had done a good job at Cox?

6 A. I felt we did, yes.

7 Q. While you were at Cox, did you receive annual reviews?

8 A. I did.

9 Q. And how did you do with those annual reviews?

11:47:31 10 A. From the last time I checked, they were pretty good. I
11 had no disciplinary actions or anything of that nature. It
12 seemed that we were doing a good job.

13 Q. Did you ever receive a negative review?

14 A. No.

15 Q. Did you ever receive a lukewarm review?

16 A. Yeah, I don't know what you mean by lukewarm. We always
17 talked about areas of improvement. But, of course, in any
18 position there is always an area of improvement, whether that's
19 in speaking with a customer or taking too long of a lunch. You
11:47:57 20 never know.

21 But lukewarm, no. I think they were all very
22 positive. Even on the ones where I had work to do, I could see
23 where I had work to do and get better every single day,
24 hopefully.

25 Q. And did you receive a bonus each and every year you were

1 at Cox?

2 A. No.

3 Q. And in what years did you not receive bonuses?

4 A. Bonuses at the time were only given to managers and above.
5 So before -- before, I was a manager, I did not -- I got a
6 turkey for Thanksgiving, which was cool, but not a bonus during
7 that time.

8 Q. So since the time you became a manager, did you receive a
9 bonus every year?

11:48:45 10 A. Yes, I did.

11 Q. So for how many years did you serve as the manager or the
12 person responsible for the abuse group?

13 A. Oof. As a manager, I believe it was four to five years.

14 Q. So roughly 2011 to 2016?

15 A. Somewhere around there.

16 Q. Okay. And before that, you were part of the abuse team,
17 just not the manager, correct?

18 A. Yes.

19 Q. Okay. And so, you're very familiar with the abuse team at
11:49:20 20 Cox, correct?

21 A. At that time, yeah.

22 Q. And you understood that the abuse team was primarily
23 responsible for the enforcement of Cox's Acceptable Use Policy,
24 correct?

25 A. Correct.

1 Q. And the Acceptable Use Policy is part of Cox's agreement
2 with its Internet account holders and governs the way in which
3 account holders are authorized to use or are prohibited from
4 using Cox's service, correct?

5 A. That is my understanding, that it is the way our clients
6 would act while using our service.

7 Q. Cox's Acceptable Use Policy provides that Cox may
8 terminate an account holder's Internet service for copyright
9 infringement, and the abuse team manages the methods,
11:50:06 10 procedures, and processes by which Cox enforces that provision,
11 correct?

12 A. Our Acceptable Use Policy gives right where we may
13 terminate someone's service for violations on any of them,
14 including copyright.

15 Q. And that the abuse team would manage that, correct?

16 A. For our team, yes, we'd manage that.

17 Q. Cox's abuse ticket handling procedures set forth how Cox
18 handled different types of abuse, correct?

19 A. We would be our -- our guides, yeah.

11:50:40 20 Q. And Cox refers to the steps for handling complaints as the
21 graduated response procedure or policy, correct?

22 A. We did have a graduated response for those.

23 Q. And you understand that the Cox Abuse Tracking System is
24 referred to as CATS, C-A-T-S, correct?

25 A. Yes, we did refer to it as CATS.

1 Q. The graduated response procedure encompasses actions by
2 customer service reps, automatic actions by CATS, and actions
3 by the abuse team working with CATS and customer service
4 representatives, correct?

5 A. Yes. That was the system that our folks would work in to
6 track allegations and complaints that came in from the
7 Internet.

8 Q. And the Cox abuse ticket handling procedures instruct the
9 abuse team and Cox's customer safety representatives about how
11:51:47 10 to respond to different types of problems, correct?

11 A. With those are -- with our -- the things that we give our
12 folks, they were our guidelines on how they could handle
13 something that was coming in if -- so they weren't confused
14 when it came in.

15 Q. And specifically, the document that is referred to
16 internally at Cox called the Cox Abuse Ticket Handling
17 Procedures instruct Cox's representatives on how to handle
18 incoming complaints, including copyright infringement
19 complaints, correct?

11:52:21 20 A. It was our guidelines for those people on the phones that
21 would be talking to customers or handling tickets.

22 Q. And a Tier 1 customer service rep is the first level of
23 customer service representative at Cox, correct?

24 A. If I remember correctly, the Tier 1 was the first person
25 answering the phone call.

1 Q. So they would answer the routine questions, but then would
2 reroute customers who had more specialized questions to an
3 appropriate department, correct?

4 A. If they could answer a question and assist a customer on
5 that first call, absolutely. From there, if they did need
6 anything else, it would then be escalated.

7 Q. Okay. And Tier 2 representatives had more specialized
8 training, including how to handle basic questions relating to
9 notices of copyright infringement, correct?

11:53:10 10 A. They would have that knowledge to assist the customer and
11 educate and help them, yes.

12 Q. And the Technical Operations Center was often referred to
13 as the TOC, T-0-C, correct?

14 A. The TOC, T-0-C.

15 Q. And the TOC was a small team of more senior customer
16 service representatives who would address the most complex and
17 serious circumstances of account holders who received multiple
18 abuse notices, correct?

19 A. They would handle the challenging ones but also, depending
11:53:43 20 on what it was, they could handle a mundane one also, too.
21 They were trained in different areas.

22 Q. And Cox also had a National Support Center, often referred
23 to as the NSC, which would focus on answering questions about
24 business customers, correct?

25 A. The National Support Center, yes, for business customers.

1 Q. Broadly speaking --

2 A. Sure.

3 Q. -- there were -- within Cox's abuse procedures, there were
4 several different types of actions that Cox might take in
5 response to an infringement notice, correct?

6 A. Depending on the infringement, there were different
7 situations that we could take action on.

8 Q. When you say, depending upon the infringement, are you
9 saying something other than copyright infringement? Or are you
10 saying depending on the type of copyright infringement?

11 A. No. Other ones, such as spam or malware. We had, you
12 know, different procedures for certain things.

13 Q. And when Cox received multiple copyright complaints in a
14 single day for a particular customer, Cox would associate all
15 of those complaints on a single ticket, correct?

16 A. If it did come in, we put it under the customer's account,
17 and that would be sent to the actual customer under a ticket.

18 Q. Mr. Zabek, I am going to hand you what's been marked as
19 Plaintiff's 255.

11:55:14 20 Do you recognize this document?

21 A. Yes.

22 Q. And this is a declaration that you signed on or around
23 October 12, 2015, correct?

24 A. October 12?

25 Q. Correct.

1 A. Yeah.

2 Q. Of 2015, correct?

3 A. Correct.

4 Q. And that's your signature, correct?

5 A. It is.

6 Q. And did you in fact sign this?

7 A. Yes.

8 Q. And when you signed it, were you attesting that the
9 contents of this declaration were true and accurate?

11:55:45 10 A. To the best of my knowledge, yes.

11 Q. If you could please turn to page 5 of this declaration.

12 A. Yes.

13 Q. In footnote 2, it says in the first sentence: Cox
14 associates multiple copyright complaints it receives in one day
15 for a given account with a single CATS ticket and will take a
16 single action on that ticket, but Cox makes note of every
17 copyright complaint received during that day on that ticket.

18 Do you see that?

19 A. I do.

11:56:29 20 Q. Does that refresh your recollection that when Cox received
21 multiple copyright infringement complaints with respect to a
22 single subscriber on a single day, that Cox would aggregate
23 those complaints onto a single ticket?

24 A. It does. It does refresh. Yes. And as we would keep
25 each complaint within the account also, too.

1 Q. Mr. Zabek, I am going to hand you what has been marked as
2 Plaintiff's Exhibit 256.

3 Do you recognize this document, Mr. Zabek?

4 A. Vaguely. It has been awhile.

5 Q. This is a transcript of your deposition taken on June 2,
6 2015.

7 A. Uh-hum.

8 Q. Is this the deposition transcript that you reviewed in
9 advance of this deposition?

11:57:21 10 A. Yes.

11 Q. I would ask you to please turn to page 39 of this
12 transcript. And I -- I'm sorry. And I would ask you to go
13 down to line 17.

14 You were asked the question: Is there mandatory
15 training -- let me just simplify the question. Is there
16 mandatory training for the employees of the abuse group?

17 And you responded: There is not a mandatory
18 training.

19 Do you see that?

11:57:56 20 A. I do.

21 Q. And that was your deposition then --

22 A. Yeah.

23 Q. -- on June 2, 2015, under oath, correct?

24 And you understand that a customer of Cox who was
25 using file sharing software to allow Internet users to download

1 MP3 files of copyrighted music from his computer, that that
2 would be a network security violation, correct?

3 A. It would be more of an AUP violation. You can say it was
4 a network issue.

5 Q. It would be a violation of Cox's policies, correct?

6 A. Yes.

7 Q. In your mind, did you understand that the distribution of
8 music over a peer-to-peer network without authorization was
9 copyright infringement?

11:58:45 10 A. Without permission?

11 Q. Yes.

12 A. Yes.

13 Q. And that when an individual engaged in that behavior, that
14 harmed the owner of the copyrights, correct?

15 A. Not talking to the copyright holder, I don't know where --
16 you know, how it is harming them. And we never saw -- with our
17 customers, I could never tell if they were actually doing any
18 copyright infringements. We only had the allegations that we
19 would go with.

11:59:15 20 Q. Mr. Zabek, the use of peer-to-peer networks to distribute
21 copyrighted music without authorization harms the copyright
22 owner, correct?

23 A. Yeah, I think it's a possibility that it does.

24 Q. Have you ever used BitTorrent?

25 A. Have I?

1 Q. Yes.

2 A. No.

3 Q. Have you ever use -- did you ever use Napster?

4 A. No, I never had any -- I still buy physical CDs.

5 Q. Did you ever use Grokster?

6 A. No.

7 Q. Did you ever use Kazaa?

8 A. No.

9 Q. Did you ever use Gnutella?

11:59:51 10 A. No.

11 Q. You know what BitTorrent is used for, correct?

12 A. Yes.

13 Q. It's used primarily for piracy, correct?

14 A. I would not agree that it's used for -- there's been many
15 cases of legitimate -- NASA has released large photos using the
16 BitTorrent network because it was the easiest way to get it
17 sent. I believe there's several bands that have actually
18 released their albums on it and then came back and said, pay us
19 for it.

12:00:23 20 So there's a -- there are definitely many legitimate
21 uses for it out there.

22 Q. While you were at Cox working in the abuse team, did you
23 understand that BitTorrent was primarily used for piracy?

24 A. If we look at our complaints that we would get in, yeah,
25 you could draw that conclusion, absolutely.

1 Q. I am going to hand you what has been marked as
2 Plaintiff's 258, which is Bates-labeled Cox_BMG_00188943 and
3 '944.

4 This is an e-mail that you sent -- on the top of this
5 document is an e-mail that you sent to Steven Wimmer at Cox on
6 October 16, 2012; is that correct?

7 A. October 16, 2012, yes.

8 Q. And you sent this e-mail, correct?

9 A. I do see that it is from me.

12:01:24 10 Q. And this e-mail, the re line says: Archer Incident
11 IR 155, possible BitTorrent use on internal network - Closed.

12 Do you see that?

13 A. I do.

14 Q. Do you know what this e-mail is about?

15 A. I believe -- let me look through.

16 I don't remember. Generally this is -- looks like
17 somebody was using BitTorrent within the corporate network.

18 Q. A Cox employee or somebody on the internal Cox network was
19 using BitTorrent; is that correct?

12:02:25 20 A. I can say -- somebody on the internal network seemed to be
21 using it, yes.

22 Q. And your response to that was: Better fire that person!
23 BitTorrent is used for only -- is used for one thing only ...
24 and I would know.

25 Right?

1 A. Yep.

2 Q. And why did you say, better fire that person?

3 A. Oh, well, kind of in my personality -- I mean, as you can
4 see, we have got two exclamation points and a smiley face at
5 the end here. Kind of being sarcastic to them. You know, oh,
6 my gosh, that's what it's for, we better fire them.

7 But this is why we have conversations with these
8 folks, we do the investigations, see exactly what was going on
9 there. We don't even know if it was an employee. So how could
10 we fire somebody?

12:03:11

11 Q. But in this e-mail you said, better fire that person,
12 because you presumed that they were using BitTorrent for piracy
13 purposes, correct?

14 MR. MCGUFFEE: Objection.

15 A. No, not in this case. I mean, we are looking at -- we use
16 sarcasm and joking and say, you know, oop, better fire that
17 person. You know, unfortunately, tone doesn't come out and
18 sometimes personality doesn't come out in e-mail.

19 But that's where we again would have conversations
20 with these folks and find out what's going on and then make our
21 next moves to do that.

12:03:36

22 Q. And you said, BitTorrent is used for only -- is used for
23 one thing only, because you knew that BitTorrent was used
24 primarily for piracy, correct?

25 A. No. Like I stated before, it's not always used just for

1 piracy. NASA has released photos. Bands have released music.

2 Can't tell exactly what this person was doing with it, but --

3 Q. And you said, I would know, because you in fact had used

4 BitTorrent for piracy purposes, correct?

5 A. No. As I had stated before, I wasn't a BitTorrent user or

6 peer-to-peer network user. A lot of this would come from just

7 the things that we had seen within the allegations coming in.

8 Q. So you -- it's your testimony here today that when you

9 said, BitTorrent is used for one thing only and I would know,

12:04:21 10 that that testimony -- that statement was made in light of the

11 fact that you had never used BitTorrent, according to you,

12 right?

13 A. That comes from my knowledge of seeing the tickets that

14 would come in for peer -- copyright infringements and with the

15 BitTorrent network. Not from my personal use of using it.

16 Q. So you were aware that Cox had received many infringement

17 notices from copyright holders, correct?

18 A. Yes. We continued to receive infringement notices,

19 allegations from many, yeah, many copyright holders. And they

12:04:57 20 would always, of course, send it to us when they felt it was a

21 violation.

22 Q. And these notices were advising Cox that the alleged

23 infringement had occurred on the Cox network, which is why they

24 were sent to Cox, right?

25 A. Yeah, the -- the allegations would state that it

1 originated from the Cox network, which is why we would receive
2 the complaint.

3 Q. And when you say, it originated from the Cox network, you
4 are referring to the alleged infringement, correct?

5 A. For this case, yes.

6 Q. Okay. While you were working in the abuse department, Cox
7 received millions of infringement notices, correct?

8 A. We got a lot. I can't give you a number. I'm sorry, I
9 don't remember the exact numbers.

12:05:52 10 Q. But it was a lot?

11 A. It was a lot.

12 Q. Assuming that the infringement notices came in included
13 all of the requirements that Cox set forth, Cox presumed that
14 the infringement notices were valid, correct?

15 A. Yeah, not every single time. One of the things that we
16 did is we would set up partnerships. When I say partnerships,
17 we would talk to a lot of copyright holders that wanted to send
18 these in, and we would make sure that they would have the right
19 information in there. So digital signatures, things like that.

12:06:26 20 Ones like that that came in, we could look at that and have
21 good faith in saying that it was.

22 If we would get something from, say, a mom-and-pop
23 shop, which did happen every once in a while, or from somebody
24 even trying to even fake their buddy out or friends, we have
25 seen those in the past, to get them in trouble, those were

1 absolutely under scrutiny.

2 Q. And you're aware that Cox received notices from the RIAA,
3 correct?

4 A. Yes, we did receive notices from them.

5 Q. And when you received those notices, you presumed they
6 were valid, correct?

7 A. As long as they had the proper information on there, P2P
8 signatures, things like that, that we had spoke with them, yes,
9 we would assume that it was valid and make an action letter.

12:07:08 10 Q. And in your opinion, the vast majority of the subscriber,
11 Cox subscribers who were using peer-to-peer were doing so on
12 purpose, correct?

13 A. I would not speculate that our customers were using it on
14 purpose every single time. I'm sure, you know, some were. But
15 every customer, I don't know exactly what they were doing with
16 it. I am sure there were some that were actually using it for,
17 you know, nefarious activity.

18 Q. In fact, you believe that 99 percent of the infringement
19 notices is from people using peer-to-peer on purpose, correct?

12:07:49 20 A. With our complaints that were coming in, if they were
21 against the Bit -- against BitTorrent, for using BitTorrent,
22 that in those cases they were -- they would have more than
23 likely installed it or at least using it at that point in time.

24 Q. And using it on purpose, correct?

25 A. I would believe so. The only other case I know is that if

1 a hacker got on their computer, was running proxy server or
2 software, things like that, we have seen infections in those
3 kind of cases. There are always some areas where it's not
4 known.

5 Q. But that was the exception, correct, not -- not the rule?

6 A. We saw several of those out there. I couldn't give you an
7 exact number on it.

8 Q. But in the overwhelming majority of instances, you
9 believed that the peer-to-peer activity was taking place on
10 purpose, correct?

11 A. That they wanted to use it.

12 Q. Yes. And you believed, Mr. Zabek, that if a customer was
13 doing something on purpose and you could discover it, then you
14 didn't want them on the Cox network, correct?

15 A. Not necessarily. If we could help the customer, educate
16 them on anything that they didn't understand, felt they were
17 doing incorrectly, if we could do that, we would want to see if
18 we could help them instead of immediately just disconnecting
19 them.

12:09:21 20 Q. If a Cox customer was intentionally using -- engaging in
21 spam, hacking, or DOS attacks, you didn't want those people on
22 the Cox network, correct?

23 A. Again, each case is kind of different. I mean, we have
24 seen DOS attacks where the customer wasn't even aware it was
25 happening, they were infected. Those people I still would want

1 on the network, but they need help, they need education, to get
2 clean, fixed, and made whole to protect not only our network,
3 but the Internet also, too.

4 So if we had a spam complaint, it wasn't an
5 immediate, you know, you're off of the Cox network. We felt a
6 responsibility to help those folks. They may not know that
7 they are actually spamming. They're just thinking that they
8 are sending out a mailing list for their soccer team. And
9 we've seen those too.

12:10:17 10 So in each case we wanted to help and educate the
11 customer as much as possible.

12 Q. Mr. Zabek, when you found a Cox subscriber who was
13 intentionally or on purpose engaging in spam, hacking, or
14 denial of service attacks, you didn't want those people on the
15 Cox network, correct?

16 A. Well, again, you know, it's going to be a case-by-case
17 basis. Even spammers who are doing it intentionally, if we
18 could talk to them and say, you're doing this the incorrect
19 way, you need something like a confirmed opt-in list, don't
12:10:49 20 purchase your e-mail addresses, we would educate and help them.
21 We were pretty successful in those areas, too.

22 So, no, it was not an automatic, you're off the Cox
23 network. We wanted to make sure that we were assisting them as
24 much as possible. A lot of folks don't know a lot of things
25 about the Internet. We were trying to help.

1 Q. Mr. Zabek, I would ask you to look at your prior
2 deposition testimony which is before you, Exhibit 256. And I'd
3 ask you to please turn to page 225, please.

4 And at line 17 you were asked: Then you say, DMCA
5 doesn't hurt the network like DOS attacks, spam, or hacking.
6 What did you mean by that?

7 And you answered: Something of a DOS attack, D-O-S
8 attack, can actually cripple our network where no one can get
9 online. All several million of our customers, because of one
10 person doing something nefarious and very bad on our network,
11 that affects everyone immediately.

12 And then you were asked: So you didn't want to
13 terminate it and then reactivate DOS attacks, spam, or hacking
14 because that hurt the Cox network?

15 Your answer: Not necessarily. If they're doing
16 something on purpose and we can discover that, that they are --
17 which is sometimes difficult, then, no, we don't want to bring
18 them back on.

19 Do you see that?

12:12:37 20 A. I do see that.

21 Q. And so, it was your testimony, at least in June of 2015,
22 that when you found a Cox subscriber who was on purpose
23 engaging in spam, hacking, or DOS attacks, that you didn't want
24 those people back on the Cox network, correct?

25 MR. MCGUFFEE: Object to form.

1 A. Well, as we say, if we could find something that they were
2 doing on purpose and everything, we still wanted to work that
3 customer. There is always an underlying that if they're going
4 to continue that type of activity, we don't want them on the
5 network if we didn't assist them properly. But every referral
6 has got assistance --

7 I am sorry. Too fast. No problem.

8 But if there was a way to help them to stop this
9 activity, then we would want to try and keep them on the
10 network, if we could.

11 But we don't want bad -- we did not want bad people
12 on the network if they were just going to continue to do those
13 things and attack our customers with DOS.

14 Q. You understand that copyright infringement injures
15 copyright holders, correct?

16 A. From what I understand and what I have been told, yes.

17 Q. In 2010, Mr. Zabek, while you were working the abuse
18 group, you considered using a technology that would block
19 peer-to-peer traffic, correct?

12:14:06 20 A. Ten years ago? I'm sorry, I don't recall.

21 Q. Mr. Zabek, I'm going to hand you what's been marked as
22 Plaintiff's 259, which is Bates labeled Cox_Sony_00523061
23 through 62.

24 This appears to be an e-mail exchange between you and
25 Chris Buechler, B-u-e-c-h-l-e-r, at a company that you used the

1 e-mail address pfsense.org.

2 Do you see that?

3 A. I do.

4 Q. And at the bottom of this document you, on May 20, 2010,
5 sent an e-mail to PF Sense, and you identified yourself as
6 working for Cox Communications in the abuse department,
7 correct?

8 A. Yes.

9 Q. And you said you were looking for equipment that you could
10 suggest to your customers to stop file sharing, correct?

11 A. Yes.

12 Q. And you say that you have looked through your -- the
13 forums and found several posts about blocking peer-to-peer
14 traffic, and I think your system will work for our customers.
15 I'm writing you just to confirm at your stuff would be able to
16 assist and easy -- is easy to set up.

17 Do you see that?

18 A. I do.

19 Q. It's probably a typo, you meant that your stuff, I assume,
20 correct?

21 A. Sure. Sure.

22 Q. So you were reaching out to a company called PF Sense in
23 2010 to see whether or not they had a technology that would
24 stop peer-to-peer file sharing for your customers, correct?

25 A. Yes. This was for our -- yeah, our business customers,

1 yes.

2 Q. And you said at the bottom of this e-mail that: I know
3 the battle of peer-to-peer versus the copyright holders is
4 lost, but I have to do my job.

5 Right?

6 A. I did put that in there.

7 Q. So is it your testimony that the written policy in 2011
8 gave the abuse group authority to decide not to terminate?

9 A. Yes, as we reviewed each case individually.

12:17:02 10 Q. In implementing the graduated response procedure, you
11 would keep in mind the effect on the Cox business, including
12 the potential loss of revenue, of the actions you would take at
13 various stages, correct?

14 A. We tried not to look at the revenue coming in. We had
15 terminated a lot of customers that had paid us lots of money.
16 I don't know a business that likes to lose customers. But we
17 were always looking at what was best for the customers, the
18 company, and the Internet in general also, too.

19 Q. You did look at the potential loss of revenue in making
12:17:45 20 decisions on what to do, correct?

21 A. It was not a consideration when we did this. We
22 terminated spammers that were -- paid us a lot of money, but
23 they were spammers, so they had to go.

24 Q. But when it came to making decisions about copyright
25 infringement, you did consider the potential loss of revenue,

1 correct?

2 A. Loss of revenue was always a bummer for any kind of -- any
3 kind of company. We did not want to lose customers at all.
4 But in my cases when I reviewed these, I would make sure that I
5 didn't want -- did not want to look at what they were paying
6 every single month.

7 Q. I'm going to ask you to look at your declaration, which is
8 Plaintiff's Exhibit 255, please. And I would call your
9 attention to paragraph 16, please.

12:18:35 10 A. I am sorry, page?

11 Q. It's paragraph 16 on page 16, please.

12 A. Okay.

13 Q. And this is the declaration that you signed under penalty
14 of perjury, correct?

15 A. Yes.

16 Q. Mr. Zabek, is it not true that in this declaration you
17 said: Because Cox's accountholders form the foundation of its
18 business, it is also true that in implementing the graduated
19 response procedure we keep in mind the effect on the business,
12:19:06 20 including potential loss of revenue, of actions taken at
21 various stages of the procedure.

22 Isn't that in fact what you wrote and signed in this
23 declaration in 2015?

24 A. Well, looking at any of the customers, you know, there was
25 always a way, if we had to terminate them, it was a loss of

1 revenue, but it wasn't our main strong point in looking at
2 that.

3 Q. Mr. Zabek, isn't it in fact true that you, in this
4 declaration in 2015, testified that when you implemented the
5 graduated response procedure, you would keep in mind the effect
6 on Cox's business, including the potential loss of revenue?

7 A. We would keep that in mind. We would keep it in mind.

8 Q. And you understood that when their rights were infringed,
9 that that was a violation of federal law, right?

12:19:56 10 A. If -- I think if we could prove that, possibly with a due
11 process, to look through their computers. But again, we've got
12 good faith on one side, we've got good faith on the other side
13 with the customer also, too.

14 When we would assist these customers, you know, we
15 try to help them to see, are they using these products, you
16 know, legitimately? Are they using it nefariously? Are they
17 even aware of any of the issue also -- any of these issues.

18 Q. I'm handing you what's been marked as Plaintiff's
19 Exhibit 260, which is an e-mail exchange between you and
12:20:33 20 Terran, T-e-r-r-a-n, Williams in August of 2010. And this
21 document is Bates labeled Cox_Sony_00005212.

22 Mr. Zabek, in your e-mail exchange with Ms. Williams,
23 didn't you in fact say at the bottom of your e-mail:
24 99 percent of DMCA violations is from people using peer-to-peer
25 on purpose and not Trojan activity; correct?

1 A. Back then, yes, I did state that.

2 Q. And yet you also understood that Cox didn't want to lose
3 customers over copyright violations, correct?

4 A. Well, Cox didn't want to lose customers over almost
5 anything that we could help to avoid it if there was something
6 that we could assist that customer with. I don't know a
7 business that does want -- that wants to lose customers. And,
8 no, we did not want to lose customers.

9 Q. What were the factors that the abuse department would
10 consider in deciding whether or not to terminate a customer?

11 A. There are many. I can't -- it's been so long. Um, to
12 give you those. A lot of things we would look at would be, you
13 know, was -- did the customer have any violations for, again,
14 malware. You know, any kind of proxy. Could we assist them,
15 you know. Was there -- was there any software on the computer
16 that they may not have been aware of that maybe somebody else
17 put on there. Or, again, if they were enacted by a hacker and
18 being used to actually transport that data through them also,
19 too.

12:22:34 20 So we would look at many different -- several
21 different factors on there too. We'd also interview, of
22 course, the customer also, too, on that.

23 Q. You just described -- I asked you --

24 A. Yeah.

25 Q. -- what were the factors that the abuse department would

1 consider in deciding whether or not to terminate a customer.

2 And what you described were a number of things, all of which go
3 to the question of whether or not the subscriber was using file
4 sharing on purpose, correct?

5 A. That was where we would try to get to, yes. That was the
6 information we were trying to get to.

7 Q. Were there any other factors that you would consider?

8 A. I can't recall any others at the present time. I am sure
9 there might have been, but I can't recall any others.

12:23:15 10 Q. Would you consider --

11 A. It has been a while.

12 Q. -- the number of infringement notices that had been
13 received regarding that subscriber?

14 A. The number of infringement notices was something we
15 definitely looked at.

16 Q. Did you look at the number of tickets?

17 A. On the account?

18 Q. Yes.

19 A. Yes, we did. And if there were any different tickets from
12:23:34 20 DMCA also, too.

21 Q. Did you look at who the copyright owner was that had made
22 the infringement allegations?

23 A. Yes.

24 Q. And how did that play a role?

25 A. Well, we would be looking at was it a -- you know, maybe

1 one of our partners that we had spoken with before, that they
2 had, you know, signatures on and things like that. Or was it
3 maybe coming from a mom and pop, you know, that just suspected
4 something and wanted to send us a letter. You know, was it a
5 valid DMCA complaint.

6 Q. And who are the partners that you're referring to?

7 A. Well, I use that term, it's just like the folks with HBO,
8 you know, MPAA. Folks that we had talked to in the past and
9 made, you know, some agreements with, we will take their
10 notifications in and send them down to the customers.

11 Q. Did you believe that the RIAA was a partner?

12 A. I did.

13 Q. But you don't mean partner in the formal sense of the
14 word, do you?

15 A. No, no. That we would be working together to hopefully
16 help each other out.

17 Q. And why do you think you were working together with the
18 RIAA?

19 A. Why?

20 Q. Yes.

21 A. Well, it would be kind of, I think, hopefully the right
22 thing to do. So that the information they were giving us was
23 correct and the information that we were acting on was also
24 correct. And that we were hopefully assisting them in getting
25 their notifications to our customers quickly.

1 Q. You never spoke to them, did you?

2 A. Myself? No. But our team had, to make sure that we were
3 getting in their notifications in properly. And anytime that
4 we talked to somebody, even like the HBO or anything that we
5 had, we would consider them a partner at that time and they
6 could call us anytime if there were any issues.

7 Q. You agree that a copyright holder who had evidence of
8 infringement on the Cox network had every right to send Cox an
9 infringement notice, whether or not Cox wanted it or not,
10 right?

11 A. They could definitely send those in.

12 Q. And the RIAA didn't need to be a partner or reach an
13 agreement with Cox in order to send notices, correct?

14 A. No. They could put them in an e-mail and send them over
15 if they wanted to.

16 Q. Frankly, they could have sent you paper notices, right?

17 A. I guess they could. I never really got one though.

18 Q. And they --

19 A. It's always been an e-mail.

12:25:45 20 Q. Paper notices would have been very difficult to manage,
21 correct?

22 A. Oh, sure. Yes, of course.

23 Q. Even e-mail notices would have been difficult to manage,
24 correct?

25 A. They were a little bit easier, but they can be

1 challenging.

2 Q. And in fact, Cox wanted to receive notices in a specific
3 format with a specific set of criteria to a specific address,
4 correct?

5 A. Yes. We wanted them to do it in specific formats
6 following, you know, the digital signatures, things like that,
7 if we could get that. This way it was easier for us to
8 actually process that complaint quickly and get it out to the
9 actual customer.

12:26:24 10 Q. But, Mr. Zabek, based on your understanding, the RIAA
11 didn't have to send the infringement notices in a specific
12 format with a specific type of digital signature the way you
13 wanted them, right?

14 A. Oh --

15 Q. They could have sent the notices in a lot of different
16 ways that would have, as you understand it, put Cox on notice
17 of infringement on its network, correct?

18 A. From my understanding, they could send them in in
19 different forms, sure. Definitely.

12:26:58 20 Q. But the RIAA, in fact, complied with all of your
21 requirements in terms of how they sent the notices, correct?

22 A. Yes, as far as I recall, they did.

23 Q. And they didn't need your agreement to send the notices,
24 right?

25 A. From my understanding, yes.

1 Q. And you would also look at the amount of money that the
2 subscriber was paying Cox, correct?

3 A. You cannot look at the billing on there, but it wasn't a
4 factor in trying to keep the customer on. We always wanted to
5 make sure we were doing the right thing.

6 But looking at that, there's always something there
7 that says, you know, this customer does pay us a bill and we
8 don't want to lose that if we can, of course, avoid it and
9 doing the right thing, hopefully keep them in our network if it
10 is possible, if it's possible.

12:27:49

11 Q. Was the amount of money that the Cox subscriber was paying
12 you each month a factor that the abuse department would
13 consider in deciding whether to terminate a customer?

14 A. In certain cases, we would look at it, but it was not a
15 huge factor. But we would want to look and see how much they
16 were paying us each month.

17 Q. So, yes, it was a factor?

18 A. Yeah. It wasn't a huge factor, but we would review their
19 accounts.

12:28:11

20 Q. Mr. Zabek, you have Plaintiff's Exhibit 261, which is
21 Bates labeled Cox_Sony_00008318 through 8319.

22 This is an e-mail at the top from Thomas -- excuse
23 me -- Andrew Thompson in June of 2014.

24 Do you know who Andrew Thompson is?

25 A. I do.

1 Q. Who was -- who is Andrew Thompson?

2 A. He was one of our abuse engineers.

3 Q. And in this e-mail, he was -- the subject of the e-mail is
4 Termination Review, correct?

5 A. Yes.

6 Q. And in this e-mail he's trying to decide whether or not to
7 terminate a subscriber who had already been subject to three
8 suspensions to the (404) number?

9 A. Third suspension to (404)?

12:29:16 10 Q. So yes?

11 A. Yes.

12 Q. And in this e-mail, Mr. Thompson says: This customer will
13 likely fail again, but let's give him one more change. He pays
14 \$317.63 a month; correct?

15 A. Uh-huh, that is what is stated, yes.

16 Q. You can put that aside. Thank you.

17 The graduated response policies were not hard and
18 fast policies in your mind, were they?

19 A. They were our guidelines to that. We did make sure that
12:30:22 20 we had flexibility to make sure, again, we were just doing the
21 right thing for the customer.

22 Q. Your concern was the customer, right?

23 A. Well, the customer, the network, the Internet itself,
24 everyone else out there on the Internet. We all had to live in
25 it -- live on it at the same time.

1 Q. And you in fact would change the guidelines if it didn't
2 help your customer, correct?

3 A. Depends. There would be different factors on that. Did
4 it help the network? Did it help the Internet? Was it helping
5 other folks on the Internet? And did it help our -- yeah, and
6 did it help our customers to have a good -- hopefully a good
7 experience.

8 Q. I am going to hand you what has been marked as Plaintiff's
9 Exhibit 262. This is a Bates labeled Cox_Sony_00520152 through
10 155, an e-mail exchange with a number of people, including
11 yourself and Raymond Massenburg in April of 2011.

12 Who was Mr. Massenburg?

13 A. I believe he was one of our abuse personnel in the TOC.

14 Q. And in this e-mail exchange Mr. Massenburg was asking you
15 about suspensions for bulk accounts, correct?

16 A. Yes.

17 Q. And you indicated on April 18 on the third page of this
18 e-mail exchange that you couldn't just close the ticket due to
19 the DMCA and Cox's responsibility under the law, correct?

20 A. I do see that there.

21 Q. And then you go on in the next page in response to various
22 e-mails to say on April 19, 2011: Guidelines are meant to be
23 broken/changed if it does not help the customer; correct?

24 A. It does state that there.

25 Q. And that's what you told him and others within the abuse

1 group, correct?

2 A. The people on this list.

3 Q. We looked at three different versions of Cox's graduated
4 response policies, correct?

5 A. Yes.

6 Q. The 2010, 2011, and 2012 versions, correct?

7 A. Okay. I believe so.

8 Q. There was nothing in those written policies indicating
9 that a subscriber could be reactivated immediately after being
10 terminated, correct?

12:33:20

11 A. I would have to go back to review, but I believe there is
12 not.

13 Q. I'm going to hand you, Mr. Zabek, what's been marked as
14 Plaintiff's Exhibit 263, which is Bates labeled
15 Cox_Sony_00005514, which includes an e-mail from you on
16 August 12, 2009, to CCI - Abuse TOC.

17 Do you see that?

18 A. Yes.

19 Q. Do you know that e-mail address CCI - Abuse TOC?

12:34:28

20 A. Yes.

21 Q. And was that an e-mail address that went to the abuse
22 group?

23 A. Yes, it would go down to our TOC personnel.

24 Q. So this was an e-mail that you blasted out to the Cox TOC
25 group?

1 A. People handling the tickets or phone calls coming in.

2 Q. And the subject of the e-mail was DMCA Terminations,
3 correct?

4 A. Yes.

5 Q. And by DMCA, you were referring to copyright infringement?

6 A. It was interchangeable as we would speak.

7 Q. The DMCA was interchangeable for copyright infringement?

8 A. Yeah.

9 Q. And in this e-mail you headed off in bold language --
12:35:17 10 bolded -- excuse me -- language, that says: Proprietary Info!
11 This is not to be shared about outside of Cox or abuse reps.
12 It is not to be passed to Tier 1 or Tier 2. This info stays
13 within Tier 2.5 only; correct?

14 A. That is what it stated.

15 Q. So this was a document that you were sending out that was
16 not only internal to Cox, but internal to just Cox 2.5 reps,
17 correct?

18 A. It would be to our highest level of reps.

19 Q. And in this document you go on to indicate that: As we
12:36:00 20 move forward in this challenging time, we want to hold on to
21 every subscriber we can; correct?

22 A. It does state that.

23 Q. And by we, you're referring to Cox, correct?

24 A. In this one I believe I am.

25 Q. And then you say: With this in mind, if a customer is

1 terminated for DMCA or copyright infringement, you are able to
2 reactivate them after you give them a stern warning about
3 violating our AUP and the DMCA.

4 Do you see that?

5 A. I do.

6 Q. And that's what you wrote, right?

7 A. That's what I typed out, yeah.

8 Q. And then you went on to tell the team that: We still must
9 terminate in order for us to be in compliance with safe harbor,
10 but once the termination is complete, we have fulfilled our
11 obligation; correct?

12 A. That is what is stated there.

13 Q. And then you say that: After you reactivate them, the
14 DMCA counter restarts; the procedure restarts with the sending
15 of warning letters, just like a first offense; correct?

16 A. That is stated there.

17 Q. And by that, what you meant was that after somebody was
18 terminated, if they were reactivated, they wouldn't be
19 suspended or terminated for another notice, they would be
12:37:24 20 subject to another e-mail, and potentially seven other e-mails,
21 before they would be suspended again, correct?

22 A. Not in every case. Again, we had given the flexibility to
23 our folks that they could absolutely suspend off another single
24 one. Things that we had talked about within our weekly
25 meetings. You know, again, if anything wasn't clear and they

1 would ask on them, we would clear it up later.

2 Q. But here what you were saying was that the procedure was
3 to restart with warning letters?

4 A. That we could restart.

5 Q. It doesn't say, could, does it?

6 It says: The procedure restarts with sending of
7 warning letters.

8 Right?

9 A. It does say that.

12:38:03 10 Q. It doesn't say, use your best judgment to do what's best
11 for the copyright holders, does it?

12 A. It does not say that specifically.

13 Q. Well, it doesn't even infer it, does it?

14 A. Yes.

15 Q. Yes, it doesn't?

16 A. Correct.

17 Q. And this e-mail says: This is to be an unwritten
18 semi-policy; right?

19 A. Yes.

12:38:28 20 Q. We do not talk about it or give the subscriber any
21 indication that reactivating them is normal; right?

22 A. Correct.

23 Q. Now, this new policy you say in here only pertains to
24 copyright infringement, not to spammers or hackers, correct?

25 A. In this case, yes. Our folks would not be able to look at

1 a spammer or a hacker and make a judgment using their best
2 judgment to turn them back on. They were empowered in these
3 cases.

4 Q. So the reactivation policy that was set out in your
5 August 12, 2009, e-mail only applied to copyright infringement
6 violations, not to other violations of the AUP, correct?

7 A. In this -- in this message?

8 Q. Yes.

9 A. Yes.

12:39:33 10 Q. When you say in the beginning of this e-mail, as we move
11 forward in this challenging time, what do you mean by
12 "challenging time"?

13 A. I couldn't tell you. Unfortunately, it's too long ago, I
14 am sorry.

15 Q. Was it a reference to the increasing number of DMCA
16 notices or infringement notices that the abuse group was
17 receiving?

18 A. I wouldn't want to guess.

19 Q. This e-mail you didn't want to be shared with customers,
12:40:09 20 correct?

21 A. That would be correct.

22 Q. And you didn't want it to be shared with reps other than
23 abuse group, correct?

24 A. Other than our 2.5 representatives.

25 Q. And in fact, the reason that you said that you sent this

1 e-mail was because you wanted to hold on to every subscriber,
2 correct?

3 A. Well, we were sending this, we wanted to make sure that we
4 were doing the right -- again, always the right thing for the
5 customers. Are we helping them enough? Did they understand
6 what could happen if they go through that?

7 Yeah, we wanted to make sure that our -- you know,
8 helping our customers and helping our folks down in the field
9 to hopefully make the right decisions on this.

12:40:52 10 But we would not tell the customers because we did
11 not want them, well, gaming the system. I could go up to this
12 many and, you know, and they just come right back on.
13 Everything was a -- we tried to do a case-by-case basis.

14 Q. In your prior testimony on this document, you in fact
15 testified in 2015, did you not, that you sent this semi-policy
16 out because you wanted to hold on to every subscriber?

17 A. There -- again, there's no company that wants to lose
18 customers. And, yes, we do want -- we did want to hold on to
19 every customer that we could as long as they were a good
12:41:33 20 customer.

21 Q. Mr. Zabek, was the reason you sent out this unwritten
22 semi-policy because you wanted to hold on to every customer?

23 A. These were sent out -- again, we don't -- we never wanted
24 to lose a customer. Again, I don't know businesses that do.
25 We also wanted to make sure that our 2.5 people understood that

1 they were really the only ones that could really review the
2 case and see if we could reactivate them at the time. This is
3 why I only stayed here with Tier 2.5. We didn't authorize this
4 or send it out to any of the customers. Yeah.

5 Q. I have handed you what's been marked as Plaintiff's 264,
6 which is Bates-labeled Cox_Sony_00005520 through 21. It
7 appears to be a series of e-mail exchanges that starts with an
8 e-mail from Kat Rhodes to CCI - Abuse Corporate in June of
9 2010.

10 A. Uh-hum.

11 Q. So now this is roughly ten months after your e-mail, the
12 unwritten semi-policy that we were discussing in exhibit -- in
13 the prior exhibit, right?

14 A. Yeah, prior -- or before.

15 Q. And in this e-mail Ms. Roads asks: Just for
16 clarification, when a customer is terminated for the first
17 time, do we need your okay to turn them back on, or do we make
18 the call?

19 And she says: Going by the documentation, it is your
12:43:20 20 call; right?

21 A. I'm sorry?

22 Q. That's what the e-mail that she sent says?

23 A. She is asking.

24 Q. Yeah. And you responded to her e-mail the next morning,
25 correct, on June 17, 2010?

1 A. Yes.

2 Q. And in your response you say: If it is for DMCA or
3 copyright infringement, you can go ahead and reactivate; right?

4 A. I see that.

5 Q. That's what you said, right?

6 A. I see that, yeah.

7 Q. And it is what you said?

8 A. It is what I typed out there.

9 Q. Yeah. And then you said: Any other issues, hacking,
12:43:55 10 spam, et cetera, give us a heads up and we can all look
11 together; right?

12 A. That is stated there.

13 Q. And then Ms. -- do you know who Casey Fraysier is?

14 A. Yes.

15 Q. And who is Casey Fraysier?

16 A. He was one of our abuse representatives.

17 Q. And Mr. Fraysier wrote on June 22, 2010, that: I think
18 it's a good idea because in 99 percent of the cases we're going
19 to turn the customer back on.

12:44:23 20 Do you see that?

21 A. I do see that.

22 Q. Well, is that how you would interpret that sentence,
23 reading it?

24 A. I would say he is incorrect in that, but that is the way I
25 would be reading it. I don't know if that was his intent. I

1 don't know his intent.

2 Q. Nothing within the graduated response policy talks about
3 reactivations, correct?

4 A. Yes.

5 Q. And in fact, you sent e-mails to others within Cox
6 indicating that from your perspective DMCA equaled reactivate,
7 correct?

8 A. At one point in time I had sent an e-mail on that to a
9 particular individual.

12:45:06 10 Q. In fact, you didn't just send it to a particular
11 individual, did you, Mr. Zabek? You sent it broadly to others
12 within the abuse group, correct?

13 A. Yeah, I think it was a reply to all.

14 Q. I'm going to hand you what's been marked as Plaintiff's
15 265, which is Bates-labeled 00005532 through 33.

16 And in this e-mail exchange, Mr. Zabek, on April 20,
17 2011, you sent an e-mail to Mr. Sikes and to the entire Hampton
18 Roads abuse group and abuse corporate group indicating that
19 DMCA equaled reactive, correct?

12:45:53 20 A. I do see that there.

21 Q. And that's what you wrote, correct?

22 A. Yes.

23 Q. And then you followed up that e-mail literally a minute
24 later saying: Well -- excuse me. You followed up that e-mail
25 literally one minute later saying: You can make them wait a

1 day or so if you want, smiley face; correct?

2 A. Yes.

3 Q. But you didn't make sure that they understood those things
4 in that e-mail, did you?

5 A. No, I didn't think I had to. Hopefully they were very
6 smart people that we hired down there and would understand
7 that.

8 Q. Mr. Zabek, I'm going to hand you what was previously
9 marked as Plaintiff's 82.

12:46:40 10 This is an e-mail from you on January 17, 2010, to
11 Andrea Dameri and CCI - abuse corporate, correct?

12 This exhibit is an e-mail exchange between you and
13 Andrea Dameri in January of 2010, correct?

14 A. Yes.

15 Q. And in this e-mail exchange -- this e-mail exchange
16 concerns a particular customer, correct?

17 A. This is speaking about a particular customer.

18 Q. The e-mail exchange with -- begins with Ms. Dameri asking
19 you about a particular customer, correct?

12:47:32 20 A. Yes.

21 Q. And Ms. Dameri indicates that that customer has had
22 several e-mail warnings, followed by suspensions up to TOC, and
23 was terminated December 8.

24 She then goes on to say: Voicemail call back on
25 January 7 shows I explained to the account holder they could

1 request review in six months for possible reactivation.

2 A. Uh-hum.

3 Q. Do you see that?

4 A. Yeah.

5 Q. And then it says that: The ICOMS notes show that somebody
6 called about -- that the customer called about the January bill
7 on January 11 and was reinstated; right?

8 A. ICOMS notes shows -- it does state that.

9 Q. And then Ms. Dameri says: We already have a DMCA
10 complaint on -- and then lists a ticket number, right?

11 A. Yes.

12 Q. So she is saying that even after being reinstated, now
13 there is another DMCA complaint, correct?

14 A. Correct.

15 Q. And then you respond to Ms. Dameri, correct?

16 A. Yes.

17 Q. And you say: This is fine. If asked, I would have
18 allowed them back on; right?

19 A. I did say that.

12:48:57 20 Q. And you say: We've been turning customers back on who
21 have been terminated for DMCA complaints. Correct?

22 A. I do show that there.

23 Q. And then you say: As long as our process of warnings,
24 suspension, then termination is followed, we can turn the
25 customer back on and start the DMCA count over; right?

1 A. That is stated there.

2 Q. Okay. And that is what you wrote, correct?

3 A. Yes.

4 Q. And then you went on and say: During this time, as we try
5 to keep customers and gain more RGUs, it is important to try
6 and balance the needs of the company with the protection of the
7 network; correct?

8 A. Yes.

9 Q. So I understand what it means to say, as we try to keep
10 customers, what does "gain more RGUs" mean?
12:49:39

11 A. That would be more customers, revenue generating units.

12 Q. RGU stands for revenue generating units?

13 A. Trying to -- yeah, trying to grow our customer base, of
14 course.

15 Q. Then you go on to say: DMCA does not hurt the network
16 like DOS attack, spam, or hacking; right?

17 A. Yes.

18 Q. And then you say: It is not something we advertise,
19 however; correct?

12:50:10 20 A. It does state that there.

21 Q. The DOS attacks, spam, and hacking, would hurt Cox, right?

22 A. It would actually hurt our customers realistically.

23 Q. Cox and the customers, correct?

24 A. Depending on the -- it depends on the attack. But it
25 could be either/or or both. But, realistically, most of those

1 cases, it was really our customers that got hurt.

2 Q. And who got hurt by the copyright infringement was the
3 copyright holders, correct?

4 A. If there was that going on in the network, yes, it would
5 be the copyright holders.

6 Q. Mr. Zabek, you have been handed what has been marked as
7 Plaintiff's 266, which is Bates labeled Cox_Sony_00005528 and
8 29.

9 This is an e-mail exchange between you and, among
10 others, Casey Fraysier in August of 2010, correct?
12:50:57

11 A. I see that here.

12 Q. And originally Mr. Fraysier -- it is a mister, right?

13 A. It is.

14 Q. Mr. Fraysier indicates to you that there seems to be some
15 confusion, so he wants to make sure that we're all on the same
16 page, right? And -- right?

17 A. This is what he is stating.

18 Q. And then he asks: If you have a customer who has been
19 terminated for DMCA, and we have subsequently reactivated their
12:51:40 20 CHSI service, or high-speed service, the next complaint for
21 DMCA that they receive is to be treated as a brand-new
22 complaint.

23 He goes on and says: Once terminated, the customer
24 is given a clean slate so that the next complaint after
25 termination should be a hold for more complaints.

1 He goes on to say: The next one after that would
2 start their warnings 1 through 6, then the suspensions.

3 Right? Is that what Casey says, Mr. Zabek?

4 A. This is what he is stating, yes.

5 Q. And you respond to his e-mail and you say: Hey all,
6 internal info only, do not forward. After termination of
7 DMCA -- or, in other words, for a copyright infringement,
8 right?

9 A. Uh-hum.

12:52:30 10 Q. If you do suspend someone for another DMCA violation, you
11 are not wrong.

12 And by DMCA violation, again you mean copyright
13 infringement, right?

14 A. Yes.

15 Q. However, if the customer has a Cox.net e-mail, we would
16 like to start the warning cycle over, hold for more, et cetera.

17 That's what you say, right?

18 A. That is there.

19 Q. And then you say: A clean slate, if you will; right?

12:52:58 20 A. Uh-hum.

21 Q. And then you go on to say in this e-mail: This way we can
22 collect a few extra weeks of payments for their account; right?

23 A. I did say that in there with my sarcastic smiley face,
24 yes.

25 Q. Well, but it was in fact true that you would continue to

1 collect payments, correct?

2 A. Well, if we did have them on there, they would be paying
3 their bills.

4 Q. Right. So if you reactivated the subscriber, Cox would
5 now get paid. Whereas if you didn't reactivate them, Cox would
6 not be paid by that subscriber, right?

7 A. The billing would start at that time, yes. But in these
8 cases, you know, with, again, sarcastic remarks to our folks in
9 the field that we had relationships with to make sure that we
10 kept at least our relationship open too. We would do that
11 every once in a while. But it's not --

12 Q. What was sarcastic about that?

13 A. You know, it's little things like, hey, we can collect a
14 couple extra bucks, you know, wink wink, fudge fudge, whatever.

15 We had really good relationships with our folks down
16 there. And it wasn't always straight up -- wasn't always
17 straight up seriousness that we took everything.

18 But the statement, I mean, obviously, if we did, you
19 know, reactivate the customer, we would be getting billing back
20 for them to collect their, you know, dollars from them.

21 Q. I'm going to hand you, Mr. Zabek, what has been marked as
22 Plaintiff's 267.

23 Now I have really handed you 267, which is Bates
24 labeled Cox_Sony_00511210.

25 This is an e-mail exchange between you and

1 Mr. Vredenburg, among others, correct?

2 A. Yes.

3 Q. Who was Mr. Vredenburg?

4 A. Roger was one of our technical operations team members.

5 Q. He reported to you either directly or indirectly; is that
6 right?

7 A. He reported to Chris Burns. He would work the tickets as
8 they would come in, or assist customers as they were calling
9 in.

12:55:04 10 Q. Was he in the abuse group somehow?

11 A. He was, yes. But none of them reported directly to me at
12 all.

13 Q. And Mr. Vredenburg e-mails you and others and says -- with
14 reference to a ticket number here and says: Here is another
15 example of a customer that I consider an habitual abuser.

16 Do you see that?

17 A. I do.

18 Q. And then he goes on and says: In a year was terminated
19 twice and turned back on; right? That's what he says?

12:55:42 20 A. That is what is stated here.

21 Q. And then Mr. Vredenburg goes on to say: I suspended him
22 again since no e-mail address. And according to procedure, he
23 starts the process over again -- process over; right? Correct?

24 A. That is what is stated here.

25 Q. And you responded on March 5, 2011, to Mr. Vredenburg and

1 you say: It is fine, we need the customers; correct?

2 A. I do see that.

3 Q. Well, but Roger called him a habitual user, and you've
4 repeatedly told us today that the discretion was left to the
5 abuse group representative, right?

6 A. Yes.

7 Q. And yet Roger is calling this guy a habitual abuser, and
8 you say its okay for Roger to reactivate him again, right?

9 A. I do.

12:56:34 10 Q. You just said you don't spy on your customers, right?

11 A. Yes.

12 Q. Do you believe that when Cox received a notification of
13 infringement, that that meant that customer had engaged in one
14 act of copyright infringement? Or do you believe that the
15 copyright owner was telling you that a subscriber was
16 infringing generally on the network with respect to a
17 particular work?

18 A. I would hope that they weren't doing anything other than
19 the violation that we did receive. I don't speculate if the
12:57:05 20 customer or guess if they were going to be sending out
21 thousands and thousands and we only got one.

22 My feelings on that, they could have been. But until
23 we actually see, you know, some kind of evidence or a complaint
24 on it, I wouldn't want to try and guess.

25 Q. So, Mr. Zabek, so you believed that when you received an

1 infringement notice from a copyright holder, that that was just
2 notice of a single infringement and you weren't aware that that
3 subscriber may have been broadly engaged in infringement other
4 than that one point in time?

5 A. Really, I'd have no proof that they were doing anything
6 other than that one -- than that one violation. We could
7 suspect or guess or my gut or anything. And as Roger says
8 here, he considers them a habitual abuser. But that's his
9 feeling on it. And we try not to go with feelings, of course.

12:57:59 10 Q. What do you mean you don't want to go by feelings? Didn't
11 you say that it's up to the representative to make
12 discretionary choices?

13 A. As we got up to other terminations and when they looked at
14 that evidence, that body of evidence that was in there, they
15 could make their determinations on that and, again, make their
16 best judgment call on those issues.

17 But to say that we're going to just -- this is a
18 habitual user, or they're a bad person, you know, that was not
19 the biggest -- not our big factor saying that they're just
12:58:34 20 considering and doing it constantly all the time.

21 Q. With the benefit of hindsight, do you think this was a
22 mistake letting this customer back on the network, Mr. Zabek?

23 A. I don't know. I would have to go back, and I would want
24 to look at the account.

25 Q. Mr. Zabek, I'm going to hand you what was previously

1 marked Plaintiff's 81 --

2 THE COURT: Why don't we stop here since you have got
3 a new document, and it's 1 o'clock.

4 All right. We are going to break for an hour, and we
5 will come back and continue to listen to the deposition.

6 So have a good lunch, and we will see you at
7 2 o'clock.

8 Thank you, you are excused.

9 NOTE: At this point the jury leaves the courtroom;
10 whereupon the case continues as follows:

11 JURY OUT

12 THE COURT: Okay. Anything before we break?

13 MR. ELKIN: Not here, Your Honor.

14 MR. OPPENHEIM: Not from the plaintiffs, Your Honor.

15 THE COURT: All right. We're in recess for one hour.

16 NOTE: The morning portion of the case on December 9,
17 2019, is concluded.

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19
20 CERTIFICATE OF COURT REPORTERS

21 We certify that the foregoing is a true and
22 accurate transcription of our stenographic notes.

23 /s/ Norman B. Linnell
Norman B. Linnell, RPR, CM, VCE, FCRR

24 /s/ Anneliese J. Thomson
25 Anneliese J. Thomson, RDR, CRR